# IB Capital Sdn Bhd v Ivory Indah Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(W)-951–05 OF 2019
YAACOB MD SAM, NANTHA BALAN AND CHE MOHD RUZIMA JJCA
3 AUGUST 2021

*Land Law — Trusts — Constructive trust — Dispute over ownership of land — Whether plaintiff was equitable chargee — Whether defendants had actual knowledge of plaintiff's interest — Whether defendants were constructive trustees — Whether defendants were bona fide purchasers — Whether plaintiff's conduct was such that they lost their prior interest or became disentitled to equitable reliefs — Whether there was a spectacular delay by plaintiff — Whether laches had set in — Whether plaintiff had waived their rights or interests — Whether there was willful blindness on part of defendants — Whether defendants had acted bona fide — Whether there was equitable fraud on part of defendants — National Land Code s 340(1)*

The subject matter of the present case was a piece of land situated in Penang ('the land') which was owned by Dato' Krishna Kumar a/l T N Sharma ('Sharma'). Sharma's corporate vehicle known as Trident Hill Sdn Bhd had taken loan facilities from Malaysian Assurance Alliance Bhd ('MAA') and the land was offered as security. Sharma had also obtained loans totalling RM8.8m ('the loans') from IB Capital Sdn Bhd ('the plaintiff') and pursuant to various contracts between Sharma and the plaintiff, Sharma had offered the land as a security for the loans. Subsequently, vide a sale and purchase cum buy-back agreement ('the SPBA'), it was agreed that the plaintiff would purchase the land, subject to payment of the redemption sum to MAA. Sharma gave powers of attorney to the plaintiff and the plaintiff entered private caveats over the land. The loans were treated as part payment towards the purchase of the land. The plaintiff also relied on a consent judgment which was recorded in Suit 775 that Sharma had commenced against the plaintiff. One of the terms of the said consent judgment was that if Sharma failed to get a buyer to purchase the land, or to settle the sum of RM10,256,098.66 by 31 August 2008, then the beneficial ownership of the land would pass to the plaintiff. Sharma failed to get a buyer to purchase the land, or to settle the said sum before or even after 31 August 2008. On 5 September 2013, the MAA charges were discharged upon payment of the redemption sum. On the same day, the land was transferred to the first defendant ('D1') and a legal charge was registered in favour of the second defendant ('D2'). Aggrieved, the plaintiff filed an action against the defendants. The plaintiff contended that the D1 would have been aware of the

consent judgement. As against D2, the plaintiff contended that D2 had knowledge of the plaintiff's interest in the land based on D2's letter of offer dated 17 July 2012 which expressly stated that the purpose of the facilities was to pay the redemption sum to the plaintiff and MAA. The plaintiff's claim was that D1 and D2 had actual or constructive knowledge of the plaintiff's prior interest over the land, and that despite becoming the registered owner and legal chargee respectively, they nevertheless held the land as bare trustees, or as constructive trustees for the plaintiff. At the end of the trial, the High Court judge ('the HCJ') concluded that the plaintiff was not the beneficial owner of the land under a bare trust as they had not paid the full purchase price and had not paid the redemption sum to MAA to obtain a discharge of the MAA charges. The HCJ held that the plaintiff's alleged interest did not enjoy priority, and that D1 and D2 obtained an indefeasible title under s 340(1) of the National Land Code. Dissatisfied with the HCJ's decision, the plaintiff filed the present appeal. The issues to be determined in the present appeal were in relation to: (a) the plaintiff's interest over the land; (b) the defendants' knowledge; (c) the conduct of the defendants; (d) whether the defendants were constructive trustees; (e) whether the defendants were bona fide purchasers; and (f) whether the plaintiff's conduct was such that they lost their prior interest or became disentitled to equitable reliefs.

**Held**, allowing the appeal, and setting aside the decision of the High Court:

(1) It was undisputable that at all times prior to the lapse of the plaintiff's caveats, D1 regarded the plaintiff as having an interest in and over the land and that for the plaintiff's caveats to be cancelled, the plaintiff must be paid the 'redemption sum' arising out of the loans that were given by the plaintiff to Sharma. The plaintiff's interest was that of an equitable chargee. In any event, the plaintiff's overarching interest was that pursuant to the SPBA and upon paying RM8.8m to Sharma, they acquired beneficial ownership under a constructive trust (see paras 284, 286 & 354).

(2) Whilst the plaintiff had a contractual right to the land after paying the redemption sums to MAA, such right was not exercised timeously or at all. They just sat on their rights and the redemption sum was not even paid to MAA. But there was absolutely no evidence that the plaintiff had at any time relinquished or waived their rights or interest as equitable chargee. At all times, they had expected that they would receive their return of investment. In the present case, the delay was to be reckoned from the time the plaintiff's caveats lapsed, ie 29 November 2012. There was nothing that the defendants could do when the plaintiff's caveats were still valid. The caveat was a restraint on dealings. The plaintiff lost their hold or grip over the land on 5 September 2013. The period of delay or inaction was from 29 November 2012 until 5 September 2013. The present action was filed on 29 January 2014. It was effectively a period of

around a year or thereabouts. It was by no means a spectacular delay and it could not be said that laches had set in (see paras 294 & 304–305).

(3) The fact that the letter of offer dated 17 July 2012 referred to payment of redemption sum to the plaintiff made it plain, unarguable and inescapable that D2 was aware of the plaintiff's interest over the land, and they knew that there was 'redemption sum' which was payable to the plaintiff. Therefore, it was quite clear that D2 had actual knowledge of the plaintiff's interest as an equitable chargee (see paras 309, 312 & 354).

(4) The evidence suggested that D2 was not concerned or was oblivious as to whether the redemption sum had been paid to the plaintiff. They were quite content with the knowledge that the plaintiff's caveats had lapsed and that D1 had obtained an order restraining the plaintiff from entering any fresh caveats. This in the court's opinion was suggestive of wilful blindness. In addition, the above evidence did not demonstrate that the defendants were acting bona fide. There was also equitable fraud because the defendants entered into banking facility agreements, which were bona fide in themselves, but they were in fraud of the plaintiff. Further, the defendants behaved inequitably and displayed wilful disregard of the plaintiff's interest as an equitable chargee, and were guilty of unconscionable conduct and therefore, equitable fraud (see paras 326, 330, 351–352 & 354).

(5) In totality, the court agreed that any reasonable tribunal armed with the facts as alluded to above, which the court had analysed, would have concluded that the plaintiff had invested money in the land and the defendants had actual knowledge of the same and based on the principle in the case of Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614 , the beneficial interest in the land vested in the plaintiff upon the execution of the SPBA. Thus, a reasonable tribunal would have opined that the defendants' conscience was bound, and it was appropriate to impose or fasten a remedial constructive trust of the plaintiff's interest (see para 353).

(6) The amount that should be used to calculate the amount of equitable compensation was the amount per the redemption amount that D1 had agreed to in January 2008, ie RM9m. At the very least, RM9m was the amount which the plaintiff had been deprived off. Although the court was convinced that the plaintiff succeeded in the action, the court was of the view that there was a failure on their part to mitigate. They were guilty of inaction and failure to protect their interest. Considering the above findings, the court ordered 20% deduction from the amount of RM9m. The court found that D1 was more culpable as compared to D2, as such, the court ordered D1 to pay equitable compensation in the sum of RM6,300,000 (being 70% of the sum of RM9m) and D2 to pay equitable compensation in the sum of RM900,000 (being 10 % of the

sum of RM9m) and the amounts ordered herein shall carry interest at 5%pa from the date of the judgment in the High Court ie 19 April 2019. The court further ordered that each of the defendants to pay RM100,000 as costs here and below subject to allocator (see paras 364–365, 376–378 & 382–383).

**[Bahasa Malaysia summary**

Perkara yang menjadi subjek dalam kes ini ialah sebidang tanah yang terletak di Pulau Pinang ('tanah tersebut') yang dimiliki oleh Dato' Krishna Kumar a/l T N Sharma ('Sharma'). Syarikat korporat Sharma yang dikenali sebagai Trident Hill Sdn Bhd telah mendapatkan kemudahan pinjaman daripada Malaysian Assurance Alliance Bhd ('MAA') dan tanah tersebut telah ditawarkan sebagai jaminan. Sharma juga telah memperoleh pinjaman-pinjaman berjumlah RM8.8 juta ('pinjaman-pinjaman tersebut') daripada IB Capital Sdn Bhd ('plaintif') dan melalui pelbagai kontrak antara Sharma dan plaintif, Sharma telah menawarkan tanah tersebut sebagai jaminan bagi pinjaman-pinjaman tersebut. Selepas itu, melalui perjanjian jual beli merangkap pembelian balik ('SPBA'), telah dipersetujui bahawa plaintif akan membeli tanah tersebut, tertakluk kepada pembayaran jumlah tebus hutang kepada MAA. Sharma memberikan surat kuasa wakil kepada plaintif dan plaintif memasukkan kaveat persendirian ke atas tanah tersebut. Pinjaman-pinjaman tersebut dianggap sebagai sebahagian daripada bayaran untuk pembelian tanah tersebut. Plaintif juga bergantung pada penghakiman persetujuan yang direkodkan dalam Saman 775 yang telah difailkan oleh Sharma terhadap plaintif. Salah satu terma penghakiman persetujuan tersebut ialah jika Sharma gagal mendapatkan pembeli untuk membeli tanah tersebut, atau menyelesaikan jumlah RM10,256,098.66 sebelum 31 Ogos 2008, maka hak milik benefisial tanah tersebut akan diserahkan kepada plaintif. Sharma gagal mendapatkan pembeli untuk membeli tanah tersebut, atau menyelesaikan jumlah tersebut sebelum atau selepas 31 Ogos 2008. Pada 5 September 2013, cagaran MAA telah dilepaskan selepas pembayaran jumlah tebus hutang. Pada hari yang sama, tanah tersebut telah dipindahkan kepada defendan pertama ('D1') dan cagaran yang sah telah didaftarkan bagi pihak defendan kedua ('D2'). Terkilan, plaintif memfailkan tindakan terhadap defendan. Plaintif berhujah bahawa D1 sebenarnya sedar tentang kewujudan penghakiman persetujuan tersebut. Berkaitan dengan D2, plaintif berhujah bahawa D2 mempunyai pengetahuan tentang kepentingan plaintif dalam tanah tersebut berdasarkan surat tawaran D2 bertarikh 17 Julai 2012 yang secara jelas menyatakan bahawa tujuan kemudahan pinjaman tersebut adalah untuk membayar jumlah tebus hutang kepada plaintif dan MAA. Tuntutan plaintif ialah D1 dan D2 mempunyai pengetahuan sebenar atau konstruktif tentang kepentingan terdahulu plaintif ke atas tanah tersebut, dan walaupun masing-masing menjadi pemilik berdaftar dan pemegang cagaran yang sah, mereka bagaimanapun memegang tanah tersebut sebagai pemegang amanah kosong, atau sebagai pemegang amanah konstruktif untuk plaintif. Pada akhir perbicaraan, hakim Mahkamah

Tinggi ('HMT') membuat kesimpulan bahawa plaintif bukanlah pemilik benefisial tanah tersebut di bawah amanah kosong kerana mereka tidak membayar harga pembelian penuh dan tidak membayar jumlah tebus hutang kepada MAA untuk mendapatkan pelepasan cagaran MAA. Hakim Mahkamah Tinggi memutuskan bahawa kepentingan plaintif tersebut tidak mendapat keutamaan, dan D1 dan D2 memperoleh hak milik yang tidak boleh disangkal di bawah s 340(1) Kanun Tanah Negara. Tidak berpuas hati dengan keputusan HMT, plaintif memfailkan rayuan semasa. Isu-isu yang perlu ditentukan dalam rayuan ini adalah berkaitan dengan: (a) kepentingan plaintif ke atas tanah tersebut; (b) pengetahuan defendan-defendan; (c) kelakuan defendan-defendan; (d) sama ada defendan-defendan adalah pemegang amanah konstruktif; (e) sama ada defendan-defendan adalah pembeli bona fide; dan (f) sama ada kelakuan plaintif adalah sedemikian rupa sehingga mereka kehilangan kepentingan terdahulu mereka atau menjadi tidak berhak kepada relif ekuiti.

**Diputuskan**, membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi:

(1) Tidak dapat dipertikaikan bahawa pada setiap masa sebelum kaveat plaintif luput, D1 menganggap plaintif mempunyai kepentingan di dalam dan ke atas tanah tersebut dan untuk membatalkan kaveat plaintif, plaintif mesti dibayar 'jumlah tebus hutang' yang timbul daripada pinjaman yang diberikan oleh plaintif kepada Sharma. Kepentingan plaintif adalah sebagai 'equitable chargee'. Walau apa pun, kepentingan menyeluruh plaintif adalah menurut SPBA dan apabila membayar RM8.8 juta kepada Sharma, plaintif memperoleh pemilikan benefisial di bawah amanah konstruktif (lihat perenggan 284, 286 & 354).

(2) Walaupun plaintif mempunyai hak kontrak ke atas tanah tersebut selepas membayar jumlah tebus hutang kepada MAA, hak tersebut tidak dilaksanakan tepat pada masanya atau sama sekali. Mereka hanya berpegang pada hak mereka dan jumlah tebus hutang tidak dibayar kepada MAA. Tetapi langsung tiada keterangan bahawa plaintif telah pada bila-bila masa melepaskan atau mengetepikan hak atau kepentingan mereka sebagai 'equitable chargee'. Pada setiap masa, mereka menjangkakan bahawa mereka akan menerima pulangan pelaburan mereka. Dalam kes ini, kelewatan perlu dikira dari masa kaveat plaintif luput, iaitu 29 November 2012. Tiada apa yang boleh dilakukan oleh defendan apabila kaveat plaintif masih sah. Kaveat adalah sekatan terhadap urusan jual beli. Plaintif kehilangan pegangan atau genggaman ke atas tanah tersebut pada 5 September 2013. Tempoh kelewatan atau kegagalan bertindak adalah dari 29 November 2012 hingga 5 September 2013. Tindakan ini telah difailkan pada 29 Januari 2014. Secara dasarnya tempohnya adalah lebih kurang setahun. Ia sama sekali bukan satu kelewatan yang menakjubkan dan tidak boleh dikatakan bahawa 'laches'

telah berlaku (lihat perenggan 294 & 304–305).

(3) Hakikat bahawa surat tawaran bertarikh 17 Julai 2012 telah merujuk kepada pembayaran jumlah tebus hutang kepada plaintif menjadikannya jelas, tidak boleh dipertikaikan dan tidak dapat dielakkan bahawa D2 mengetahui kepentingan plaintif ke atas tanah tersebut, dan mereka tahu bahawa terdapat 'jumlah tebus hutang' yang perlu dibayar kepada plaintif. Oleh itu, agak jelas bahawa D2 mempunyai pengetahuan sebenar tentang kepentingan plaintif sebagai 'equitable chargee' (lihat perenggan 309, 312 & 354).

(4) Keterangan menunjukkan bahawa D2 tidak mengambil berat atau tidak sedar sama ada jumlah tebus hutang telah dibayar kepada plaintif. Mereka cukup berpuas hati apabila mengetahui bahawa kaveat plaintif telah luput dan D1 telah mendapat perintah menghalang plaintif daripada memasuki apa-apa kaveat baru. Ini pada pendapat mahkamah menunjukkan kebutaan yang disengajakan. Di samping itu, keterangan di atas tidak menunjukkan bahawa defendan-defendan bertindak secara bona fide. Terdapat juga 'equitable fraud' kerana defendan menandatangani perjanjian kemudahan perbankan yang bona fide, tetapi mereka melakukan penipuan ke atas plaintif. Selanjutnya, defendan-defendan berkelakuan tidak saksama dan dengan sengaja tidak menghiraukan kepentingan plaintif sebagai 'equitable chargee', dan bersalah atas kelakuan yang tidak wajar dan oleh itu, 'equitable fraud' (lihat perenggan 326, 330, 351–352 & 354).

(5) Secara keseluruhannya, mahkamah bersetuju bahawa mana-mana tribunal yang munasabah berbekalkan fakta seperti yang disebut di atas, yang telah dianalisa oleh mahkamah, akan membuat kesimpulan bahawa plaintif telah melabur wang ke atas tanah tersebut dan defendan-defendan mempunyai pengetahuan sebenar tentang perkara tersebut dan berdasarkan prinsip dalam kes Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614, kepentingan benefisial ke atas tanah tersebut terletak pada plaintif selepas pemeteraian SPBA. Oleh itu, tribunal yang munasabah akan berpendapat bahawa hati nurani defendan-defendan telah terikat, dan adalah wajar untuk mengenakan atau mengikat amanah konstruktif pemulihan bagi kepentingan plaintif (lihat perenggan 353).

(6) Jumlah yang sepatutnya digunakan untuk mengira jumlah pampasan saksama ialah jumlah berdasarkan jumlah tebus hutang yang telah dipersetujui oleh D1 pada Januari 2008, iaitu RM9 juta. Sekurang-kurangnya, RM9 juta adalah jumlah yang dinafikan terhadap plaintif. Walaupun mahkamah yakin bahawa plaintif berjaya dalam tindakan tersebut, mahkamah berpendapat bahawa terdapat kegagalan di pihak mereka untuk membuat mitigasi. Mereka bersalah kerana tidak bertindak dan gagal melindungi kepentingan mereka. Mengambil kira

dapatan-dapatan di atas, mahkamah memerintahkan potongan 20% daripada jumlah RM9 juta tersebut. Mahkamah mendapati bahawa D1 lebih bersalah berbanding D2, oleh itu, mahkamah memerintahkan D1 membayar pampasan saksama dalam jumlah RM6,300,000 (iaitu 70% daripada jumlah RM9 juta) dan D2 membayar pampasan saksama dalam jumlah sebanyak RM900,000 (iaitu 10% daripada jumlah RM9 juta) dan jumlah yang diperintahkan di sini hendaklah membawa faedah pada kadar 5% setahun dari tarikh penghakiman di Mahkamah Tinggi iaitu 19 April 2019. Mahkamah seterusnya memerintahkan bahawa setiap satu daripada defendan membayar RM100,000 sebagai kos di sini dan di bawah tertakluk kepada alokator (lihat perenggan 364–365, 376–378 & 382–383).]

**Cases referred to**

*Abigail v Lapin* [1934] AC 491, PC (refd)
*Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202; [1989] 1 CLJ Rep 219; [1989] 1 CLJ 693, HC (refd)
*Atlas Cabinets & Furniture Ltd et al v National Trust Co Ltd* [1990] 68 DLR (4th) 161, CA (refd)
*Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, Ch D (refd)
*Barnhart v Greenshields* [1853] 9 Moo PCC, PC (refd)
*Bhup Narain Singh v Goku Chand Mahton* (1933) LR 61 Ind App 115 (refd)
*Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 AMR 1537; [1996] 2 CLJ 561, FC (refd)
*Bulyah bt Ishak & Anor (administrators for the estate of Nor Zainir bin Rahmat) v Ambank (M) Bhd (in liquidation) and another appeal* [2018] 1 MLJ 484; [2018] 3 CLJ 478, CA (refd)
*Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534, SC (refd)
*Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18; [1980] AC 331; [1979] 3 WLR 373; [1979] 4 WLUK 30; [1979] 123 SJ 301, PC (refd)
*Foskett v McKeown and others* [2000] 3 All ER 97, HL (refd)
*Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal* [2006] MLJU 649; [2007] 3 CLJ 413; [2007] 2 AMR 521, CA (refd)
*Hadley v London Bank of Scotland* (1865) 12 LT 747 (refd)
*Haji Abdul Gafur Haji Hussenbhai v The Ahmedabad Municipal Corporation* (1967) 8 GLR 65, HC (refd)
*Harmony Shipping Co SA v Davis and others* [1979] 3 All ER 177, CA (refd)
*He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal* [2020] 4 MLJ 662; [2020] 7 CLJ 71, FC (refd)
*Hunt v Fripp* [1898] 1 Ch 675, Ch D (refd)
*Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145; [1974] 1 LNS 51, FC (refd)

A *Koh Siew Keng (P) & Anor v Koh Heng Jin* [2008] 3 MLJ 822; [2008] 3 CLJ 450, CA (refd)
*Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94; [1997] 1 CLJ 636; [1997] 1 AMR 997, FC (refd)
*Libertarian Investments Ltd v Thomas Alexej Hall* [2014] 1 HKC 368; [2013]
B HKCFA 93; (2013) 16 HKCFAR 681 (refd)
*Lim Yoke Kong v Sivapiran a/l Sabapathy* [1992] 2 MLJ 571; [1992] 4 CLJ 2219; [1992] 1 AMR 269, SC (refd)
*Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 (refd)
*Loke Yew v Port Swettenham Rubber Company Limited* [1913] AC 491, PC
C (refd)
*Lysaght v Edwards* (1876) 2 Ch D 499, Ch D (refd)
*Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266; [1984] 1 CLJ Rep 230; [1984] 1 CLJ 286, FC (refd)
*Manilal & Sons (M) Sdn Bhd v M Majumder* [1988] 2 MLJ 305; [1988] 1 LNS
D 16, SC (refd)
*Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196; [1969] 1 LNS 106 (refd)
*Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165; [1970] 1 LNS 82 (refd)
E *Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals* [2017] MLJU 445; [2017] 1 LNS 622, CA (refd)
*Nawab Din v Mohamed Shariff & Ors and Mohamed Shariff & Ors v Nawab Din* [1953] 1 MLJ 12b; [1952] 1 LNS 64 (refd)
*Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan*
F *Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)
*Nwakobi (Osha of Obosi) v Nzekwu* [1964] 1 WLR 1019, PC (refd)
*Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; [1971] 1 LNS 96, FC (folld)
*Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ
G 465; [1998] 1 AMR 16; [1998] 1 CLJ 793, FC (refd)
*Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* [2017] MLJU 1107; [2017] 8 CLJ 392, FC (refd)
*RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal* [2016] 1 MLJ 175; [2015] 1 CLJ 309, FC (refd)
H *Vandervell's Trusts (No 2) White and others v Vandervell Trustees Ltd, In re* [1974] Ch 269, CA (refd)
*Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944; [2018] 3 AMR 259; [2015] AMEJ 1824, FC (folld)
*Schnogl v BB* [2005] BCJ No 2712, CA (refd)
I *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42; [2004] 5 AMR 648; [2004] 3 CLJ 679, CA (refd)
*Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 2 AMR 609; [2010] 1 CLJ 381, FC (refd)
*Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016] 3 CLJ 193, FC (folld)

*Target Holdings Ltd v Redferns (a firm) and another* [1995] 3 All ER 785; [1996] AC 421; [1995] UKHL 10, HL (refd)
*United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169; [1975] 1 LNS 187, FC (refd)
*Yaacob bin Lebai Jusoh v Hamisah binti Saad* [1950] 1 MLJ 255; [1950] 1 MLR 210; [1950] 1 LNS 100, CA (refd)
*Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614; [1994] 3 CLJ 20; [1994] 2 AMR 1445, SC (folld)
*Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182, FC (refd)
*Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799; [2014] 1 AMR 418; [2014] 2 CLJ 445, FC (refd)

**Legislation referred to**

Companies Regulations 1966 Form 44
Evidence Act 1950 s 114(g)
Limitation Act 1953 ss 22, 29(b)
National Land Code ss 323(1), (1)(b), 327, 328, 329(2), 340, 340(1), (3), (4)(b), Forms 16A, 19B

**Appeal from**: Suit No 22NCVC-20–01 of 2014 (High Court, Penang)

*Gopal Sri Ram (Wong Yee Chue, Jean Aw Yuen Hui, Karluis Queck and Sharifah Alawiah with him) (YC Wong) for the appellant.*
*John Khoo Boo Lai (Wee Wai Keong with him) (Ismail Khoo & Assoc) for the first respondent.*
*Yoong Sin Min (Marianne Loh Suet May and Charmaine Choong Suet Yin with her) (Shook Lin & Bok) for the second respondent.*

**Nantha Balan JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** This is an appeal against the decision of the learned judge ('the judge') dated 19 April 2019 in Penang High Court Suit No 22NCVC-20–01 of 2014 ('Suit 20') wherein at the conclusion of a full trial (conducted on 4 and 12 October 2018, 7 and 10 December 2018, and 14 January 2019), the plaintiff's claim for reliefs under a bare trust, or alternatively under a constructive trust, was dismissed with costs. For convenience, the appellant, IB Capital Sdn Bhd shall be referred to as 'the plaintiff', the first respondent, Ivory Indah Sdn Bhd as 'D1' and the second respondent, CIMB Islamic Bank Bhd as 'D2'. Where necessary, D1 and D2 shall be referred to collectively as 'the defendants'.

**[2]** The subject matter of Suit 20 was a parcel of land held under GRN 1272 Lot 2838 Mukim 18, Daerah Timur Laut, Negeri Pulau Pinang ('the land'). At all material times, the registered (legal/beneficial) owner of the land was Dato' Krishna Kumar a/l TN Sharma ('Sharma'). A company called Trident Hill Sdn Bhd (Sharma's corporate vehicle) had taken loan facilities from Malaysian Assurance Alliance Bhd ('MAA'). Sharma offered the land as security. As such, legal charges in favour of MAA (as chargee) via Presentation No 29731/2004 and Presentation No 12651/2005 ('the MAA charges'), were registered over the land. On 5 September 2013, the MAA charges were discharged upon payment of the redemption sum. On the same day, the land was transferred to D1 and a legal charge was registered in favour of D2.

**[3]** The gist of the plaintiff's claim in Suit 20 was that initially the land was held by Sharma and later, by D1 and D2 as bare trustees, or as constructive trustees for the plaintiff. Sharma was not a party to and did not testify in Suit 20. The starting point of the plaintiff's case is that they had given loans totalling RM8.8m to Sharma. The plaintiff executed various contracts with Sharma pursuant to which the land was offered as security for the loans. Later, it was agreed that the plaintiff would purchase the land, subject to payment of the redemption sum to MAA. Sharma gave powers of attorney to the plaintiff. The plaintiff entered private caveats over the land. The basis for the entry of the caveats was that the land was security for the loans and the plaintiff had a caveatable interest over the land. The loans were treated as part payment towards the purchase of the land. The plaintiff also relied on a consent judgment which was recorded in a suit that Sharma had commenced against the plaintiff. One of the terms of that consent judgment was that if Sharma failed to get a buyer to purchase the land, or to settle the sum of RM10,256,098.66 by 31 August 2008, then the beneficial ownership of the land would pass to the plaintiff. At any rate, it was contended that Sharma was a bare trustee/constructive trustee of the land for the plaintiff. Thereafter, D1 and D2 became bare trustees/constructive trustees for the plaintiff.

**[4]** Sharma failed to procure a buyer to purchase the land, or to settle the said sum before or even after 31 August 2008. The plaintiff contended that D1 would have been aware of the consent judgment. The plaintiff's claim was that D1 and D2 had actual or constructive knowledge of the plaintiff's prior interest over the land, and that despite becoming the registered owner and legal chargee respectively (with effect from 5 September 2013), they nevertheless held the land as bare trustees, or as constructive trustees for the plaintiff.

**[5]** At the conclusion of a full trial, the judge however concluded that the plaintiff was not the beneficial owner of the land under a bare trust as they had not paid the full purchase price and had not paid the redemption sum to MAA

to obtain a discharge of the MAA charges. The judge held that the plaintiff's alleged interest did not enjoy priority, and that D1 and D2 obtained an indefeasible title under s 340(1) of the National Land Code .

**[6]** Essentially, the judge concluded that whatever interest that the plaintiff may have had in and over the land, was lost due to their indolence, inaction, and non-payment of the balance purchase price or to be more precise, failure to pay the redemption sum to MAA.

**[7]** Although in the High Court, the plaintiff claimed that Sharma, D1 and D2 were trustees of the land under 'bare trust' or under a 'constructive trust', on appeal before us, counsel for the plaintiff recalibrated his position and stated quite unequivocally that the plaintiff was not seeking to take any beneficial interest under a 'bare trust'.

**[8]** Counsel advanced the argument that the plaintiff was seeking remedies under a constructive trust. He said that his primary position is that the plaintiff is a bona fide purchaser who had made part payment of the purchase price and had become beneficial owner of the land which entitled the plaintiff to impugn the registration of the title to D1's name and registration of the charge in favour of D2, so that legal ownership may be given to the plaintiff. The plaintiff's alternative position is that at the very least, they were an 'equitable chargee'.

**[9]** For the sake of completeness, it is necessary to mention that the plaintiff's case in the High Court was predicated on the basis of the following issues:

(a) whether the plaintiff was the beneficial owner of the land?

(b) whether D1 being the registered proprietor of the land, merely held the land as a bare trustee or constructive trustee for the plaintiff?

(c) if the answer to the above is in the affirmative, whether D1 had no title to charge the land to D2?

(d) whether D2 being the chargee of the land, held the land as a bare trustee or constructive trustee for the plaintiff?

(e) whether D1 and D2 were bona fide purchasers for value without notice of the plaintiff's beneficial ownership to the land?

(f) whether D1's title to the land, and D2's interest under the charge, were defeasible?

**[10]** In so far as the claim under constructive trust is concerned, counsel for the plaintiff said that he was seeking a 'remedial constructive trust' rather than an 'institutional constructive trust'. These concepts are discussed elsewhere in

this judgment. The plaintiff maintained that they had a prior equity over the defendants as they had executed prior contracts with Sharma to buy the land, and both the defendants had notice of the plaintiff's interest. In the case of D1, they knew of the plaintiff's interest well before they contracted with Sharma to purchase the land. And in so far as D2 was concerned, they knew of the plaintiff's interest well before they agreed to provide financing and to accept the charge as security for the loan to D1 to finance the purchase, and to pay MAA.

**[11]** Based on the loan that was given to Sharma and the contracts that were entered, the plaintiff entered two caveats over the land. It is of course trite that the entry of a caveat does not confer any priority nor does it create new rights in favour of the caveator (see: *Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196; [1969] 1 LNS 106 (HC)).

**[12]** The caveat gives notice (warning) to the world at large that the caveator was claiming or asserting an interest or right over the land. The caveat temporarily protects such interests/rights in anticipation of legal proceedings. The effect of a caveat is to bind the land itself and prevent any registered disposition of the land except with the caveator's consent until the caveat was removed. It operated very much like a statutory injunction and afforded interim protection of rights to title to the land or registrable interest in land that are alleged by the caveator, but not yet proved (see: Lord Diplock in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18; [1980] AC 331; [1979] 3 WLR 373; [1979] 4 WLUK 30; [1979] 123 SJ 301 (PC)).

**[13]** It is also instructive to refer to the judgment of Gill FCJ in *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; [1971] 1 LNS 96 (FC) ('Ong Chat Pang') where he discussed (at p 230 (MLJ)) the possibility of unregistered interests arising under contract giving rise to caveatable interests and its relevance to the question of priority of interests:

> Unregistered interests in land may be recognised as interests in land, whenever in doing so they do not do violence to the principles and purposes of the Code, where the intention is to establish one estate in land only so as to ensure protection to bona fide purchasers for valuable consideration or decide priorities in the case of competing equities.
>
> Thus, a purchaser has a caveatable interest, and he can forbid, by registering a caveat, the subsequent registration of any transfer, charge or lease, until the caveat is removed. The rights of the purchaser are said to rest in equity in that the court, in the exercise of its equitable jurisdiction, may grant him specific performance of the contract by ordering the vendor to execute a valid and registrable document of transfer.

**[14]** According to the plaintiff, based on the contemporaneous documents and the information that was known to all the parties, the defendants are not

bona fide purchasers for value without notice of the plaintiff's prior contract. The plaintiff contended that the transfer of title to the land to D1 and the registration of charge in favour of D2 are liable to be set aside. The case of *Ong Chat Pang* was cited as the precedent.

**[15]** In *Ong Chat Pang*'s case, the plaintiff had purchased the land from the first and second defendants (the landowners). The plaintiff paid 50% of the purchase consideration (RM15,000) to the landowners. Soon thereafter, the landowners sold the same property to the third and fourth defendants. The third and fourth defendants paid the full purchase price to the landowners. The plaintiff sought to enter a private caveat over the land. It was later rejected by the Registrar of Titles. The land was transferred to the third and fourth defendants. According to the evidence, the third and fourth defendants *knew* of the earlier contract of sale between the plaintiff and the landowners. At that point in time when the action for specific performance was filed, the balance of the purchase price had not yet been paid. The first and second defendants did not defend the action. The third and fourth defendants took the position that they had an indefeasible title to the property.

**[16]** It was accepted in evidence that whilst the third and fourth defendants were not party to any fraud, they were *aware of the contract between the plaintiff and the landowners (first and second defendants)*. The plaintiff in *Ong Chat Pang*'s case brought an action for specific performance of the sale agreement against the first and second defendants as the registered owners of the land at the time of the presentation of the caveat, and against the third and fourth defendants as interested parties. The Federal Court upheld the High Court's findings that the third and fourth defendants had not proven that they were bona fide purchasers for value without notice of the plaintiff's prior interest over the land arising under the earlier contract between the plaintiff and first and second defendants. The registration of title in the names of the third and defendant fourth defendants was set aside and specific performance was ordered subject to the plaintiff paying the balance of the purchase price to the first and second defendants. There is more to be said about *Ong Chat Pang* and this is found elsewhere in the judgment (see: paras 242 and 249–250 of this judgment).

**[17]** As mentioned earlier, in the present case, D1 became the registered owner of the land with effect from 5 September 2013. They purchased the land from Sharma whereas D2 provided the financing to enable D1 to purchase the land. D2 took a legal charge over the land. The redemption sum payable to MAA for the discharge of the MAA charges was RM46.5m. A sum of RM40m out of the banking facility granted by D2 was utilised to pay MAA to procure the discharge of the MAA charges. The balance sum of RM6.15m which was

paid to MAA, came from D1. These are all well documented. They are not controversial. The controversy arises from other aspects of the narrative.

**[18]** Looking at all the facts and the events which transpired, it is fair to say that there is not much dispute as to what had taken place. The documents speak volumes about the events and sheds much needed light on the parties' intentions, motives, or the underlying agenda. Hence, we would safely regard the events to be as stated in the respective chronology of events which were filed by the parties to this appeal. However, in light of the view that we took of this case, it is necessary to state the facts (especially the correspondence) in some detail. This will reveal the *content* of what had transpired, and the *context* in which they occurred.

**[19]** We return now to the mainstream of the appeal.

**[20]** There is no dispute that the discharge of the MAA charges, the transfer of the title to land to D1, and the registration of the charge in favour of D2 took place on 5 September 2013. Soon thereafter, the plaintiff conducted some land searches and court file searches. After having discovered what had taken place, the plaintiff filed Suit 20 on *29 January 2014*.

**[21]** It would be convenient at this juncture to make some observations about who did, and who did not, testify at the trial. The following witnesses testified at the trial:

(a) Datin Sri Loo Chooi Ting, (Manager of the plaintiff) (PW1);

(b) Dato' Sri Dr Wong Yeon Chai (Chief Executive Officer of the plaintiff) (PW2);

(c) Lee Chin Aik (Senior Personal Assistant to the Group Chief Executive Officer — Group CEO) (DW1) (on behalf of D1); and

(d) Teh Chee Seng (Credit Officer of D2's Commercial Banking Centre, Penang) (DW2) (on behalf of D2).

**[22]** We turn now to those who did not testify. In this regard, it is imperative to mention two key individuals who played critical and pivotal roles in the events that were quickly unfolding who did not testify at the trial.

**[23]** The first is Sharma (the landowner) and the other is Dato' Low Eng Hock ('Dato' Low'), the Managing Director of D1. Counsel for D2 said that the solicitor from Messrs Azlan Shah Sukhdev & Co, the solicitors who handled the moneylending agreement dated 9 May 2006 between the plaintiff and Sharma, should have testified.

**[24]** On the other hand, counsel for the plaintiff said that the solicitor from Messrs Ong & Manecksha, who handled the transaction between D1 and Sharma, should have testified about, inter alia, the issues surrounding the redemption statement and agreement by D1 to use part of the banking facility to pay the redemption sum to the plaintiff. It was also argued that D1 should have called the solicitors from the same firm to explain the issue of service of the cause papers for Originating Summons No 24–2106–12 of 2012 at the plaintiff's previous address, when they were aware that the plaintiff had shifted from that address.

**[25]** In our view, quite apart from these names which were mentioned there is yet one other person who should have testified. None of the parties brought up his name. He is Veera Pandiya Palaniappan ('Veera'), the Acting Deputy Area Commercial Manager for D2. *Veera co-signed D2's letter of offer dated 17 July 2012*. The other signatory to that letter is Azhar Idris, the Area Commercial Manager. *Veera also co-signed the supplementary letter of offer dated 5 August 2013*.

**[26]** Hence, *Veera is the common thread vis a vis the letter of offer dated 17 July 2012 and supplementary letter of offer dated 5 August 2013*. But alas, D2 sent DW2 to testify in circumstances where it should have been obvious all round that Veera was a relevant witness and he should have come forward to provide answers to some of the searching questions that have bedevilled this case.

**[27]** We will first deal with Sharma's absence as a witness. Curiously, it was counsel for D2 who took the point that the plaintiff should have called Sharma as a witness and that having failed to do so, an adverse inference should be made against the plaintiff. Of course, it was open to any party to call Sharma as a witness since there is no property in a witness (see: *Harmony Shipping Co SA v Davis and others* [1979] 3 All ER 177 (CA)).

**[28]** But we hardly think that any of the parties would have taken the risk of calling Sharma as their witness. This is because, based on all that had taken place during the gestation of the transactions involving D1/Sharma, the plaintiff/Sharma and the plaintiff/D1, it would have been quite clear to anyone who had anything to do with Sharma that he was not someone in whom any trust or confidence can be reposed as a contracting party, much less as a witness. In the circumstances then prevailing, and considering Sharma's predilections and propensities, as can be readily seen from the letters which he had written, and the letters written about him, it would have been foolhardy for the plaintiff to have called him as a witness. Indeed, given Sharma's innate propensity to extract any advantage or benefit for himself as and when any situation or

A opportunity presented itself, the party calling him as a witness would have taken a great risk and would, in any event, have had to pay a heavy price, both literally and metaphorically.

B **[29]** This is because Sharma's dealings and prevarications especially with D1, had generated such a degree of suspicion, scorn and disdain to the extent that D1's solicitors (Messrs Ong & Manecksha) were impelled to describe him sardonically (per their letter dated *4 April 2008* to Sharma's solicitors, Messrs Gunaseelan & Associates) as 'the expert in taking advantage of the whole situation and twisting all the facts for his benefit'. In our view, anyone who was C apprised of all the facts would have made the tactically prudent decision not to call Sharma as a witness. In the circumstances, there is nothing sinister about the plaintiff not calling Sharma. At any rate, we do not see how Sharma's testimony would have changed the course of the trial. If anything, Sharma's presence at the trial may have unnecessarily prolonged the trial and obfuscated D the real issues.

**[30]** For completeness, it should be mentioned that Sharma was declared a bankrupt via adjudicating and receiving orders dated 7 May 2010 and E 22 October 2010. But that is neither here nor there, except that the defendants say that it is because of Sharma's bankruptcy that the plaintiff have (as an afterthought) trained their guns on them, presumably because they have 'deep pockets'. Hence, it was suggested that it was because of Sharma's inability to repay the loan that the plaintiff decided to mount a claim against the F defendants. At any rate, looking at all the events in the round and having examined the contemporaneous documents, we do not agree that any adverse inference should be drawn against the plaintiff for not calling Sharma as a witness.

G **[31]** We turn next to Dato' Low. He was the Group Chief Executive Officer of the Ivory Indah Group of Companies. Dato' Low had actively communicated with Sharma, both orally and via letters as well. There was much that went on between these two individuals.

H **[32]** It cannot be denied that Dato' Low played a key role in the transactions involving Sharma. He was 'calling all the shots' so to speak. He gave instructions to the solicitors. He was therefore an important witness for D1. Dato' Low was after all the Managing Director of D1 and was actively involved in the transactions involving Sharma and the plaintiff. Yet, he chose not to I testify. Instead, Mr Lee Chin Aik (DW1) was sent to testify on behalf of D1. DW1 admitted that Dato' Low was the one who was privy to the facts and had given the requisite instructions to the lawyers etc and that he would have been the proper person to testify. According to DW1, Dato' Low was 'not able' to testify as he was 'too busy'. Dato' Low's so-called inability to attend court to

testify on behalf of D1 is quite frankly, ludicrous to say the least. But this appears to have escaped the judge's attention. The judge appeared to have been oblivious to the plaintiff's complaint that Dato' Low should have, but did not, or rather chose not to testify. The inference is irresistible that Dato' Low did not want to subject himself to cross-examination. Counsel for the plaintiff said that an adverse inference should be drawn against D1 for failing to produce Dato' Low as a witness.

**[33]** At any rate, in so far as DW1's evidence is concerned, one would have expected his witness statement to be quite substantial since D1 was heavily involved in the narrative of events stretching from mid-2007 to September 2013. But DW1's witness statement was a mere 11 paragraphs. However, in cross-examination by counsel for the plaintiff, DW1 seemed to give robust answers. He was very stoic, inflexible and was at times combative. He spoke as if he was all along involved in the dealings with Sharma, Messrs Ong & Manecksha alongside Dato' Low.

**[34]** But in truth, DW1 only joined the Ivory Indah Group in 2011. He had no personal knowledge of the transaction involving the purchase of the land by D1. Ultimately, DW1's evidence was based on D1's records. DW1 tried to give what he thought were clever answers, especially in regard to the plaintiff's redemption statement. He said that D1 was not concerned with any private party's redemption statement. He said that D1 only recognized a financial institution's redemption statement.

**[35]** At any rate, he sought to downplay the importance of the plaintiff's redemption statement or as to D1's obligation to pay the redemption sum to the plaintiff. DW1 said that the plaintiff must first establish that their redemption statement is 'valid'. But it is important to note that DW1 had never specifically dealt with the affairs or business of D1. We will deal with DW1's evidence in the later part of this judgment.

PLAINTIFF'S LOAN TO SHARMA

**[36]** The plaintiff is a licensed moneylender. On 9 May 2006, the plaintiff granted a loan of RM5m to Sharma. At all material times, the land was encumbered by way of the MAA charges. The loan was to be repaid by 9 November 2006. Sharma agreed to pledge the land to the plaintiff as security for the loan. Sharma also granted the plaintiff an irrevocable option to purchase the land. He also agreed that the plaintiff could enter a private caveat against the land to protect its interest. Sharma also agreed to, and did give the plaintiff a power of attorney on 9 May 2006 (PA No 28062/06) which authorized the plaintiff to deal with the land if he failed to repay the loan.

PLAINTIFF'S FIRST CAVEAT

**[37]** The plaintiff entered a private caveat over the land on 18 July 2006 (via Caveat Entry Presentation No 10195/2006). A statutory declaration was affirmed by Datin Sri Loo Chooi Ting (PW1) on 17 July 2006 for and on behalf of the plaintiff which accompanied the Form 19B for entry of the caveat. Sharma failed to repay the said loan. The parties then agreed that Sharma would sell the land to the plaintiff for RM50m and that the loan of RM5m was to be treated as part payment of the purchase price.

**[38]** Pursuant to the agreement, the plaintiff paid a further sum of RM3.8m to Sharma and the total sum of RM8.8m was taken as part payment of the purchase price of the land. In a letter dated 23 September 2006 to the plaintiff, Sharma confirmed that he agreed to sell and the plaintiff agreed to buy the land for the sum of RM50m, and that RM8.8m had already been paid to him by way of deposit and part payment towards account of the purchase price of the subject land. He acknowledged receipt of the sum of RM8.8m.

THE SALE AND PURCHASE CUM BUY-BACK

**[39]** The agreement as stated above was formalized by way of a sale and purchase cum buy back agreement dated 2 October 2006 ('the SPBA') between the plaintiff and Sharma. Pursuant to the SPBA, Sharma granted a second power of attorney dated 2 October 2006 to the plaintiff.

**[40]** In Sharma's letter dated 2 October 2006, he confirmed that he had received from the plaintiff the total sum of RM8.8m pursuant to cl 2 of the SPBA. The details of the payments by the plaintiff making up the loan of RM8.8m are as follows:

(a) RHB Cheque No 389357 dated 2 October 2006 for the sum of RM1m paid to Sharma;

(b) RHB Cheque No 389356 dated 2 October 2006 for the sum of RM1m paid to Sharma's account in MAA in order to regularise the account;

(c) RHB Cheque No 389358 dated 2 October 2006 for the sum of RM1.8m paid to Sharma; and

(d) RM5m already paid to Sharma on 9 May 2006.

**[41]** Before us, counsel for D2 said that the plaintiff had failed to prove that a loan of RM8.8m was given to Sharma. We should perhaps mention at the outset that in her grounds of judgment, the judge did not make any finding to the effect that the plaintiff did not give a loan of RM8.8m to Sharma. The judge did not state in the grounds of judgment (whether expressly or

implicitly) that she had any doubts as to the veracity of the plaintiff's assertion that they gave a loan of RM8.8m to Sharma.

**[42]** However, counsel for D2 insisted that the loan was not proven. She said the plaintiff's claim falls *in limine*. We do not think that it is as simple or simplistic as that. No doubt, during the trial, despite being challenged, the plaintiff did not bring forward any 'smoking gun' evidence to show that a loan of RM8.8m was given.

**[43]** But even a cursory examination of the contemporaneous documentary evidence will show that D1 never queried the plaintiff as to the authenticity of the loan. Further, D2 as the financier who enabled D1 to purchase the land, knew or ought to have been aware of the plaintiff's caveats (which referred to the loans to Sharma), never raised any query about whether a loan of RM8.8m was in fact given to Sharma.

**[44]** We say that D2 knew or ought to have been aware of the loan of RM8.8m because it is the plaintiff's case that D2 had actual knowledge and/or constructive knowledge of the plaintiff's interest through various sources including the plaintiff's caveats. We will come back this topic in the later part of this judgment.

PLAINTIFF'S SECOND CAVEAT

**[45]** On 30 November 2006, the plaintiff entered a second private caveat over the land to protect its interest via Caveat Entry Presentation No 17740/2006. The plaintiff's caveats No 10195/2006 and No 17740/2006 shall be referred to collectively as 'the plaintiff's caveats'. Pursuant to s 328 of the National Land Code, a private caveat shall lapse at the expiry of six years from the time from which it took effect. The plaintiff's caveats are dated *18 July 2006* and *30 November 2006*, respectively. Thus, the plaintiff's caveats lapsed on *17 July 2012* and *29 November 2012*, respectively.

**[46]** But it is necessary to keep in mind that neither the presence nor absence of a caveat can affect the right to make an equitable claim. In *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169; [1975] 1 LNS 187, Suffian LP at p 170 (MLJ) said:

> Here on the other hand the bank had not bought the lands. They only had the documents of title deposited with them to secure repayment of an overdraft. Also, they had not caveated the lands to protect their interest; but that is not their fault because they were prohibited by law (s 3(2) of the Kelantan Land Settlement Ordinance 1955) from doing so. *Nevertheless the law is quite clear: possession of the titles gives them an equitable interest in the lands, which is not affected by the absence of a caveat, as a caveat in itself does not create an interest but merely gives notice to the*

*world of the presence of an interest belonging to some one other than the registered proprietor*. (Emphasis added.)

**[47]** The same point was made in the case of *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944; [2018] 3 AMR 259; [2015] AMEJ 1824, where the Federal Court stated that an equitable interest in land was not affected by the absence of a caveat:

> [73] It must be emphasised here that in law, a *caveat does not create any rights or interest.* This was explained by Tritscher J in *CPR v District Registrar of Dauphin Land Titles Office* [1956] 4 DLR (2nd) 518 in the following words:
>
> > It is trite law that caveats are to be used for the protection of alleged as well as proved interests and that a caveat is merely a warning which creates no new rights but protects existing rights, if any.
>
> [74] The proposition was lucidly affirmed and adopted by Suffian LP in *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169, where it was held that an *equitable interest in land was not affected by the absence of a caveat*, 'as a caveat in itself does not create an interest but merely gives notice to the world of the presence of an interest belonging to someone other than the registered proprietor'.

**[48]** This was also underscored by the judgment of the Court of Appeal in *Bulyah bt Ishak & Anor (administrators for the estate of Nor Zainir bin Rahmat) v Ambank (M) Bhd (in liquidation) and another appeal* [2018] 1 MLJ 484; [2018] 3 CLJ 478 at para [45]:

> [45] Notwithstanding the fact that the plaintiffs had *not taken steps to lodge a caveat, it did not mean that the plaintiffs' rights and interest were vitiated*, as in law, a caveat does not create interest or rights.

**[49]** Thus, it is quite unarguable that whilst the caveat gave notice or warning of an interest over the land, the absence of a caveat does not mean that there is no interest which existed over the land. Hence, it was argued that the lapse of the plaintiff's caveats did not affect the plaintiff's prior rights and interests over the land. Similarly, the order obtained by D1 to remove the plaintiff's caveats without service of the originating summons, after the said caveats had already lapsed, did not vitiate the plaintiff's rights and interests in the land.

**[50]** The SPBA gave Sharma the option to repurchase the land within three months. However, Sharma did not repurchase the land within three months and the option expired. Sharma met with the plaintiff's representative, Dato' Sri Dr Wong Yeon Chai (PW2) a few times and asked for extension of time for

him to procure other purchasers to purchase the plaintiff's interests in the subject land. There were also discussions in relation to the sale of land through a public tender.

BASIS FOR THE PLAINTIFF'S CAVEATS

**[51]** The plaintiff's caveats gave notice to the world that the plaintiff had a claim over the land and/or that they had a caveatable interest. Hence, any prospective purchaser such as D1 or financier such as D2, intending to have any dealings with the land, would and should (as reasonable and prudent commercial parties) have done a land search and they would have learnt of the basis for the entry of the plaintiff's caveats. There is of course no doubt at all that D1 was fully aware of the plaintiff's caveats.

**[52]** In fact, D1 was most concerned about the plaintiff's caveats and was not prepared to get into any sort of dealings with Sharma vis a vis the land unless the plaintiff's claim was resolved by way of payment of the redemption sum so that the caveats may then be removed. It is critical to note that contractual documents between D1 and Sharma as well as the related correspondence, made explicit reference to the plaintiff's caveats.

**[53]** As for D2, it was suggested that they had actual knowledge or had the means of knowledge of the plaintiff's interest as per the plaintiff's caveats and that a redemption sum had to be paid to the plaintiff to cancel the plaintiff's caveats. Alternatively, the plaintiff submitted that D2 had constructive knowledge of the plaintiff's interest over the land. At any rate, it is indisputable that D2 was at the very least, aware of the plaintiff's caveats.

**[54]** In Q29(a) of his witness statements, DW2 said:

> ... *All that the Bank knew was that the Plaintiff had lodged the caveats over the Land*, which Ivory successfully removed (and which any event had expired) ... (Emphasis added.)

**[55]** The issue of actual knowledge and constructive knowledge is dealt with in the later part of this judgment. For now, it is important to identify the basis on which the plaintiff's caveats were entered. This calls for a scrutiny of the Form 19B and the statutory declaration which were filed at the Pejabat Pendaftar Hakmilik Tanah Pulau Pinang for the entry of the plaintiff's caveats. It is perhaps relevant to mention that from the time of entry of the plaintiff's caveats until they lapsed six years later, there was no attempt by any of the parties namely Sharma, D1 or D2 to remove the plaintiff's caveats pursuant to s 327 of the National Land Code.

**[56]** In fact, D1's application for the purported removal of the plaintiff's

caveats was only made on 3 December 2012 and this was *well after the caveats had expired*. The real purpose of that of that application was obviously to restrain the plaintiff from entering any fresh caveats over the land.

**[57]** In so far as the first caveat is concerned, it was stated in the Form 19B that:

> Kami telah memasukki [*sic*] *suatu peraturan pinjaman dengan* Dato Krishna Kumar A/L T.N. *Sharma* [NRIC NO.:3897318 (Lama); 400801–71–5341 (Baru) dalam *jumlah RM5,000,000-00* pada 9.5.2006 berdasarkan suatu peraturan pinjaman melalui surat Tetuan Azlan Shah Sukhdev & Co bertarikh 9.5.2006 (seterusnya di rujuk sebagai 'Pinjaman tersebut') Dato Krishna Kumar tersebut telah berakujanji untuk membayar semula jumlah pinjaman tersebut pada atau sebelum 9.11.2006.
>
> Dato Krishna Kumar tersebut telah *memberikan kami suatu Surat Kuasa Wakil untuk berurusan dengan hartanah beliau di sini serta membenarkan kami untuk memasukkan kaveat persendirian terhadap hartanah tersebut.*
>
> *Kami sesungguhnya kami mempunyai kepentingan untuk mengkaveat ('caveatable interest') terhadap hartanah tersebut* Alasan-alasan selanjutnya mengenai kepentingan kami dalam hartanah tersebut terkandung dalam surat akuan Datin Sri Loo Chooi Ting JP (No: KP:610620-01-5480) yang dilampirkan dan disertakan bersama ini. (Emphasis added.)

**[58]** The statutory declaration by PW1, which accompanied the Form 19B stated that:

> (1) ...
>
> (2) Syarikat kami IB CAPITAL SDN BHD (13543-H) telah memasukki [*sic*] suatu peraturan pinjaman dengan Dato Krishna Kumar A/L T.N. Sharma (NRIC NO.:3897318 (Lama); 400801-71-5341(Baru) dalam *jumlah RM5,000,000-00* pada 9.5.2006 berdasarkan suatu *peraturan pinjaman melalui surat Tetuan Azlan Shah Sukhdev & Co bertarikh 9.5.2006 (seterusnya di rujuk sebagai 'Pengaturan Pinjaman tersebut')*.
>
> (3) Berdasarkan pengaturan pinjaman tersebut. Dato Krishna Kumar A/L T.N. Sharma tersebut bersetuju serta berakujanji dengan syarikat kami IB CAPITAL SDN BHD (13543-H) seperti berikut:
>
> (i) untuk membayar semula jumlah pinjaman tersebut;
>
> (ii) *untuk meletakkan hartanahnya yang dipegang dibawah Geran No. 1272, Lot No. 2838, Mukim 18, Daerah Timur Laut, Negeri Pulau Pinang (seterusnya dirujuk sebagai 'hartanah tersebut') sebagai jaminan untuk pinjaman tersebut di mana syarikat kami IB CAPITAL SDN BHD (13543-H) berhak untuk berurusniaga dengan hartanah tersebut sekiranya Dato Krishna Kumar A/L T.N. Sharma tersebut melakukan sebarang kemungkiran pengaturan pinjaman tersebut*;
>
> (iii) untuk *memberikan syarikat kami IB CAPITAL SDN BHD (13543-H) kebenaran untuk memasukkan kaveat persendirian ke atas hartanah tersebut*; dan

(iv) untuk *memberikan syarikat kami IB CAPITAL SDN BHD (13543-H) suatu Surat Kuasa Wakil untuk berurusan dengan hartanah beliau disini sekiranya beliau gagal untuk membayar pinjaman tersebut*.

(4) Berdasarkan perkara-perkara tersebut di atas saya telah di nasihatkan oleh peguamcara saya dan saya sesungguhnya percaya nasihat tersebut bahawa syarikat kami IB CAPITAL SDN BHD (13543-H) *mempunyai kepentingan yang boleh di kaveatkan ('caveatable interest') terhadap hartanah tersebut*.

(5) Alasan-alasan yang selanjutnya di dalam Borang Permohonan Untuk Memasukkan Kaveat Persendirian (Borang 19B) yang dibuat oleh saya adalah benar.

(6) Oleh yang demikian, saya dengan rendah diri memohon agar kaveat persendirian dimasukkan ke atas hartanah tersebut bagi menjamin kepentingan syarikat kami IB CAPITAL SDN BHD (13543-H) yang boleh di kaveatkan terhadap hartanah tersebut. (Emphasis added.)

**[59]** As for the second caveat, it was stated in the Form 19B that:

Kami telah memasukki [*sic*] suatu *suatu perjanjian Sale & Purchase Cum Buy Back Agreement' bertarikh 2.10.2006 (seterusnya dirujuk sebagai 'Perjanjian Jual Beli tersebut')* dengan Dato Krishna Kumar A/L T.N. Sharma (NRIC NO.: 3897318 (Lama); 400801-71-5341(Baru) iaitu *pemilik tanah tersebut untuk membeli hartanah* yang dipegang di bawah Geran No 1272, Lot No. 2838, Mukim 18, Daerah Timur Laut, Negeri Pulau Pinang (seterusnya dirujuk sebagai 'hartanah tersebut') bagi *harga belian sebanyak RM50,000,000-00. Lanjutan kepada klausa 15 Perjanjian Jual Beli tersebut, kami boleh memasukkan kaveat persendirian ke atas hartanah tersebut untuk menjaga kepentingan kami kami sesungguhnya menyatakan bahawa kami mempunyai kepentingan untuk mengkaveat ('caveatable interest') terhadap hartanah tersebut*. Alasan-alasan selanjutnya mengenai kepentingan kami dalam hartanah tersebut terkandung dalam surat akuan Datin Sri Loo Chooi Ting JP (No: KP:610620-01-5480) yang dilampirkan dan disertakan bersama ini.

**[60]** The statutory declaration by PW1, which accompanied the Form 19B stated that:

1. ...

2. Syarikat saya IB CAPITAL SDN BHD (13543-H) (seterusnya dirujuk sebagai 'Syarikat tersebut') telah memasukki suatu perjanjian '*Sale & Purchase Cum Buy Back Agreement' bertarikh 2.10.2006* (seterusnya dirujuk sebagai 'Perjanjian Jual Beli tersebut') dengan Dato Krishna Kumar A/L T.N. Sharma (NRIC NO.:3897318 (Lama); 400801-71-5341(Baru) *iaitu pemilik tanah tersebut untuk membeli hartanah* yang dipegang di bawah Geran No. 1272, Lot No. 2838, Mukim 18, Daerah Timur Laut, Negeri Pulau Pinang (seterusnya dirujuk sebagai 'hartanah tersebut') *bagi harga belian sebanyak RM50,000,000-00.*

3. *Syarikat tersebut telahpun membuat bayaran bayaran yang perlu dibayar semasa menandatangani Perjanjian Jual Beli tersebut berdasarkan*

*terma-terma Perjanjian Jual Beli tersebut bagi hartanah tersebut.*

4. Seterusnya *lanjutan kepada klausa 15 Perjanjian Jual Beli tersebut, Syarikat tersebut boleh memasukkan kaveat persendirian ke atas hartanah tersebut untuk menjaga kepentingan Syarikat tersebut.*

5. Berdasarkan perkara-perkara tersebut di atas saya telah di nasihatkan oleh peguamcara saya dan saya sesungguhnya percaya nasihat tersebut bahawa *syarikat tersebut mempunyai kepentingan yang boleh di kaveatkan ('caveatable interest') terhadap hartanah tersebut.* (Emphasis added.)

JOINT VENTURE AGREEMENT — SHARMA AND D1

**[61]** We turn now to the contractual dealings between Sharma and D1. On 14 March 2007, Sharma and D1 entered into a joint venture agreement ('the JVA'). The JVA was for D1 to develop the land. Sharma was to receive 25% of the profits plus various advance payments. The intricacies and details of the JVA are quite irrelevant. *What is important however is that the plaintiff's caveats were expressly referred to in the said JVA*. In this regard, Recital [D] of the JVA states that 'there are two existing private caveats registered over the development land by IB Capital Sdn Bhd (hereinafter referred to as 'the caveator') ...'. The plaintiff's caveats were also mentioned in cl 1.1 of the JVA under the description of 'said private caveats'.

**[62]** Under cl 6.2, Sharma was to ensure that the land was free from all encumbrances, claims, liens, caveats, and third-party interests (save and except for the existing charges). Further, cl 18.2 (d) required Sharma to obtain a letter from the plaintiff to undertake not to register any further caveats over the development land.

**[63]** On 21 June 2007, D1 and Sharma executed a document called the 'Supplementary Terms to the JVA'. Paragraph 7 of that document, which refer to landowner (Sharma), reads as:

> 7. The Landowner shall take all relevant actions, an cause the borrower, Trident Hill Sdn Bhd to take all relevant actions, including commencing and defending any legal suit against/by any party, any legal suit and *foreclosure proceedings by* Malaysian Assurance Alliance Berhad and/or *IB Capital Sdn Bhd* until the Developer can successfully obtain financing from a bank to, inter alia, refinance the Land in accordance with the provisions of the JV Agreement. Upon the execution hereof, the Developer may negotiate and obtain ... (Emphasis added.)

SUIT 775

**[64]** During cross-examination DW1 admitted that para 7 of the supplementary terms to the JVA was intended to 'buy-time' to enable D1 to obtain the requisite financing. Less than three weeks later, on 13 July 2007,

Sharma filed a suit via Kuala Lumpur High Court Suit No S5–22–775 of 2007 ('Suit 775') against the plaintiff and PW2.

**[65]** In Suit 775, Sharma claimed against the plaintiff and PW2, among others, a declaration that the plaintiff had breached the SBPA. But it became apparent that Suit 775 had no basis. In fact, pursuant to an agreement with Sharma, a consent judgment dated 21 August 2008 was recorded. The consent judgment is one of the building blocks for the plaintiff's claim for beneficial ownership of the land and the plea of a constructive trust.

SALE AND PURCHASE AGREEMENT — SHARMA AND D1

**[66]** On 6 August 2007, Sharma entered into a sale and purchase agreement with D1 ('the D1 SPA') to sell the land to D1 for RM75m. The D1 SPA is a curious document in that it made no mention of the plaintiffs' caveats, although the JVA between D1 and Sharma made explicit reference to the plaintiffs' caveats. The only encumbrance which the D1 SPA recognised (per para 5 of the 1st Schedule to the D1 SPA) are the MAA charges. In any event, pursuant to section 3.1 of the D1 SPA, the sale was on the basis that the land was free of all encumbrances. But all of that changed when Sharma and D1 executed the next agreement.

AGREEMENT DATED 30 JANUARY 2008

**[67]** The next document which Sharma executed with D1 was an agreement dated 30 January 2008, by which the purchase consideration was reduced by RM25m. Pursuant to cl 1.2 of the said agreement, the purchase price was reduced from RM75m to RM50m. This was purportedly to compensate D1 for payment for all the works which had been carried out pursuant to the JVA. *This is a crucial document for purposes of the fixing D1 and D2 with knowledge of the plaintiff's caveats and by logical extension, knowledge of the plaintiff's interests in and over the land*. In Recital C of the agreement it is stated that 'There are *two (2) existing Private Caveats* registered over the Land by *IB Capital Sdn Bhd (*'IB Capital') vide Pres No. 10195/2006 and 17740/2006 ('*the private caveats*')'.

**[68]** Next, section 1.6 of the agreement made reference to D1 (as the developer) and stated that 'The Landowner shall, in accordance with the sale and purchase agreement, furnish or cause to be furnished to the Developer the *redemption statement sum cum undertaking by* MAA and *IB Capital* and such letter of undertaking in such format which is required by the Developer's financier to enable the Developer's financier to release the Bank Loan'.

**[69]** In this regard, the agreement dated 30 January 2008 was referred to in para 6 of Schedule 1 to D2's general facility agreement dated 6 August 2013.

However, DW2 testified that he had not seen the agreement dated 30 January 2008 and that whilst the case was going on, he went back to look for a copy. However, he could not locate a copy of the same in D2's records.

DEED OF SETTLEMENT DATED 30 JANUARY 2008

**[70]** Sharma and D1 also executed a deed of settlement dated 30 January 2008 ('the deed'). The deed made no reference to the plaintiff's caveats. It dealt with the reduction in the purchase price. We are not really concerned with the deed.

THE CORRESPONDENCE

**[71]** It is necessary now to refer to some of the correspondence.

**[72]** On 13 November 2007, D1's erstwhile solicitors, Messrs Ong & Manecksha wrote to Sharma and stated that for the proposed payments to the plaintiff and MAA, D1 required written confirmation from the plaintiff and MAA on the redemption sums payable for the plaintiff's caveats to be withdrawn, and for the MAA charges to be discharged.

**[73]** On 4 December 2007, Messrs Ong & Manecksha wrote to Sharma stating that D1 was shocked at his attempt to terminate the JVA once again. D1 denied any breach of the JVA. As stated earlier, Sharma was prone to doing a 'flip-flop' on the deal which he had struck. In an attempt at keeping the deal alive, D1's solicitors mentioned in that letter that D1 required the redemption statement from the plaintiff. On 10 December 2007, Messrs Ong & Manecksha wrote to Sharma and again asked for the redemption statements from MAA and the plaintiff.

**[74]** On 29 January 2008, Messrs Ong & Manecksha wrote to Messrs Sandosh Anandan, who was the plaintiff's erstwhile solicitors, and offered a sum of RM9m as the settlement sum on behalf of Sharma to the plaintiff for the removal of the caveats. In that letter, Messrs Ong & Manecksha stated that D1's loan had been approved by CIMB Bank Bhd and that the redemption sum would be financed by CIMB Bank Bhd.

**[75]** As such, they asked the plaintiff to issue the redemption statement cum undertaking letters in the format enclosed. On 31 January 2008, Messrs Ong & Manecksha wrote to Messrs Sandosh Anandan and stated that D1's banking facilities from CIMB Bank Bhd had been approved since November 2007. Again, they requested the plaintiff to sign and issue the redemption statements cum undertaking to D1.

**[76]** The plaintiff's position was that at that material time, they were prepared to sell their interest over the land to D1 for RM9m, provided the said sum was paid immediately. On 4 February 2008, the plaintiff through Messrs Sandosh Anandan's letter to Messrs Ong and Manecksha stated that the plaintiff was prepared to accept the settlement sum of RM9m if the payment was made on or before 6 February 2008.

**[77]** The plaintiff agreed to release the withdrawal of the private caveat forms in exchange for the redemption sum of RM9m in a banker's cheque. However, the plaintiff did not receive any payment from D1 on or before 6 February 2008. The plaintiff doubted whether D1 had truly obtained approval of bank loan. Hence, they instructed Messrs Sandosh Anandan to get the loan approval letter from D1's solicitors. In view of the delay in the settlement, the plaintiff also imposed interest on the settlement sum.

**[78]** On 14 February 2008, Sharma through his letter to D1 confirmed additional terms, inter alia, that the balance portion of the balance purchase price which was payable to him under the provisions of the agreements should be paid to him as follows:

(a) RM900,000 should be paid by RENTAS to be transferred into his bank account by the next day;

(b) RM500,000 should be paid within seven working days from the first defendant's financier's receipt of the relevant redemption statement cum undertaking letters from MAA and the plaintiff in the formats required and acceptable by D1's financier, but in any event not earlier than 27 February 2008;

(c) the balance, if any, should be paid within 30 days from the financier's receipt of the redemption letters; and

(d) provided that the balance portion of the balance purchase price due from D1 to him under the provisions of the agreements (after settlement of the redemption sums due to MAA and the plaintiff) was sufficient.

**[79]** On 15 February 2008, D1 through Messrs Ong & Manecksha's letter to Messrs Sandosh Anandan stated that D1 was unable to accede to the plaintiff's request for a copy of the letter of offer from CIMB Bank Bhd as the terms and conditions of D1's bank loan were confidential but they confirmed that the letter of offer had been issued and duly accepted by D1. They also confirmed that the security documentation for the bank had been duly executed by D1 and were pending the bank's execution. Further, D1 agreed to pay the interest of RM135,000 to the plaintiff. However, D1 requested for an extension of one month from 6 March 2008 to settle the payment of the redemption sum as the bank needed time to process the release of the loan.

**[80]** In a letter dated 28 February 2008 from Sharma to D1's solicitors Messrs Ong & Manecksha, a copy of which was also extended to the plaintiff's solicitors, Sharma informed D1 that the plaintiff felt that the CIMB loan might not be real.

**[81]** One area of anxiety and concern to the plaintiff's lawyers as well as the plaintiff was that they had no evidence that there was such a loan and that it was capable of being drawn upon. Sharma asked D1's solicitors to alleviate the plaintiff's fears.

**[82]** On 28 February 2008, D1 through Messrs Ong & Manecksha's letter to Messrs Sandosh Anandan stated, inter alia, that the security documents had been duly executed by CIMB Bank Bhd and the bank was proceeding to lodge their private caveat over the land. As a matter of fact, CIMB Bank Bhd did lodge a private caveat over the land via Caveat Presentation No 0799B 2008003165.

**[83]** The letter further stated that CIMB Bank Bhd had informed Messrs Ong & Manecksha that they would settle the redemption sum due to the plaintiff in the following manner:

(a) CIMB Bank Bhd was willing to issue a letter of undertaking to the plaintiff to undertake to pay the redemption sum to the plaintiff after the transfer and charge had been presented for registration;

(b) pending the presentation of the transfer and charge for registration and the plaintiff's receipt of the redemption sum, the plaintiff need not withdraw its private caveats, but would be required to issue a letter of consent consenting to the registration of the transfer and charge; and

(c) the redemption sum should be released to the plaintiff in exchange for the requisite withdrawal of private caveat forms and other relevant documents.

**[84]** It was also stated in the letter that to ensure there was no delay in the payment of the redemption sum to the plaintiff, CIMB Bank Bhd had requested the plaintiff to furnish its redemption letter stating the amounts payable as at 6 April 2008 and 6 May 2008.

**[85]** The letter went on to state that to compensate the plaintiff for the extension of time, they may include relevant interest charges to the redemption amounts on a daily basis.

**[86]** On 5 March 2008, Sharma sent a letter to the plaintiff, a copy of which was also extended to Messrs Ong & Manecksha, requesting the plaintiff to respond to Messrs Ong & Manecksha's letter dated 28 February 2008 immediately.

**[87]** Sharma also stated in the letter that 'Further, for your information I understand that Ong & Manecksha are the lawyers for both Ivory and their Banker CIMB in this transaction and as such I do not foresee any unnecessary delay'. A copy of the letter dated 5 March 2008 from Sharma was extended to Messrs Ong & Manecksha.

**[88]** On 10 March 2008, Sharma through his letter to Messrs Sandosh Anandan, inter alia, urged the plaintiff to send to Messrs Ong & Manecksha the redemption letter in the format given by them immediately. He agreed that the settlement sum should be RM9m plus the interest of RM135,000 from 6 February 2008 to 6 March 2008 and also interest at RM4,500 per day from 7 March 2008 till date of payment but not later than 30 April 2008. In para 4(v) of the letter, Sharma stated that Messrs Ong & Manecksha as the lawyer for CIMB Bank Bhd had promised to cooperate and help expedite everything. This letter was also extended to, inter alia, Messrs Ong & Manecksha and the plaintiff.

**[89]** On 10 March 2008, the plaintiff through its letter to Sharma stated the settlement sums payable to buy over the plaintiff's interest in the land. Two statements showing the calculation of the settlement sums were enclosed. The first statement stated that the full settlement sum to be paid to the plaintiff on or before 6 April 2008 was RM9,264,000. The second statement showed the actual full amount payable as at 6 February 2008 was RM10,453,074.39. This full amount outstanding plus further interest would be payable if the plaintiff did not receive the settlement sum of RM9,264,000 by 6 April 2008.

**[90]** On 11 March 2008, in reply to the plaintiff's letter, Sharma through his letter to the plaintiff's then solicitors, Messrs Sandosh Anandan, stated that 'I received a letter and statement from IB Capital Sdn Bhd yesterday, a copy of which is enclosed for your reference. As you would have been aware by now, Messrs Ong & Manecksha are the solicitors for the purchaser of my property as well as the solicitors for the lending bank CIMB'.

**[91]** Sharma again requested the plaintiff to give Messrs Ong & Manecksha the redemption statement in the format required. Again, Sharma stated that Messrs Ong & Manecksha were the solicitors for D1 as well as CIMB Bank Bhd. This letter was also extended to Messrs Ong & Manecksha and the plaintiff. On 12 March 2008, Sharma through his letter to the plaintiff's then solicitors Messrs Sandosh Anandan again asked for the redemption statement

in the format required by CIMB Bank Bhd. He also stated that the solicitors for D1, Messrs Ong & Manecksha who were also the solicitors for CIMB Bank Bhd have been writing to the plaintiff's solicitors on the redemption statement since January 2008.

**[92]** Sharma asked Messrs Sandosh Anandan to impress upon the plaintiff to issue the redemption statement in the format required. He said in the letter that Messrs Ong & Manecksha had assured him that CIMB Bank Bhd 'would issue an undertaking on the payment within 3 working days'. This letter was also extended to Messrs Ong & Manecksha and the plaintiff. Messrs Ong & Manecksha had never denied that they were also representing CIMB Bank Bhd.

**[93]** On 13 March 2008, Messrs Ong & Manecksha through its letter to Messrs Sandosh Anandan required, inter alia, that any intended amendments to the format of the letters of undertaking to CIMB Bank Bhd and D1 be forwarded to them on the same day. They also requested for the plaintiff's redemption statement as of 6 May 2008 and stated that upon receipt, they should take all relevant action to expedite the release of the loan.

**[94]** Another letter dated 13 March 2008 was sent by Messrs Ong & Manecksha to the plaintiff's then solicitors Messrs Sandosh Anandan stating that CIMB Bank Bhd would be releasing the redemption sum only after the transfer and charge had been presented for registration. According to D1's said solicitors, in view of this, CIMB Bank Bhd would require a redemption statement with a longer validity period. They also asked if the plaintiff would issue the letter of consent consenting to the registration of the transfer and charge prior to the withdrawal of private caveat in exchange for CIMB Bank Bhd's letter of undertaking to release the redemption sum to the plaintiff.

**[95]** On 14 March 2008, Messrs Sandosh Anandan through its letter enclosed the plaintiff's letters of undertaking in favour of CIMB Bank Bhd and D1 and the plaintiff's consent in the format required to Messrs Ong & Manecksha as requested by them. In the plaintiff's letter of undertaking dated 14 March 2008 to CIMB Bank Bhd, the plaintiff informed the bank, among other things, that the full settlement/redemption sum payable on or before 30 April 2008 to buy over the plaintiff's interest in the land was RM9,369,600 (*including interest amounting to RM369,600*). The plaintiff also agreed to give the letter of withdrawal of private caveat as requested by D1 in exchange for the redemption sum.

**[96]** The contents of the plaintiff's letter of undertaking dated 14 March 2008 to D1 was almost identical. The caveator's consent was in the format of a letter dated 14 March 2008 from the plaintiff to Pendaftar Hakmilik Tanah

Pulau Pinang consenting to the registration of the transfer of the land by Sharma to D1 and the charge by D1 to CIMB Bank Bhd as requested.

**[97]** Subsequently, the plaintiff through its solicitors Messrs Sandosh Anandan's letters dated 24 March 2008 and 31 March 2008 respectively to Messrs Ong & Manecksha asked whether they had proceeded to stamp the transfer and charge documents and reminded them to provide the letter of undertaking to release the redemption sum from CIMB Bank Bhd in favour of the plaintiff as soon as possible. These letters were sent because the plaintiff had furnished all the documents requested by Messrs Ong & Manecksha.

**[98]** In reply, Messrs Ong & Manecksha through its letter dated 2 April 2008 informed the plaintiff that they were unable to proceed to stamp and register the transfer and charge as Sharma had failed or refused to cause another three caveats to be withdrawn. The three caveats were entered by TAF Holdings Sdn Bhd, Kam Chee Hong and Lim Soo Kiang. Apparently, these were all parties who had lent monies or acting on behalf of parties who had lent monies to Sharma.

**[99]** On 4 April 2008, D1 through Messrs Ong & Manecksha's letter to Messrs Gunaseelan & Associates (Sharma's then solicitors) stated, inter alia, that when D1 first considered entering the joint venture with Sharma, D1 'was concerned about IB Capital's caveats on the land', and that, 'In fact, our client clearly stated that they would not enter into the joint venture unless IB Capital's caveats were first withdrawn'.

**[100]** The letter went on to state that Sharma had assured D1 that he could deal with the plaintiff and that he could easily instruct his solicitors to 'drag' the legal proceedings with the plaintiff for years and challenge the plaintiff's claim by raising numerous objections.

**[101]** On the same day, D1 through Messrs Ong & Manecksha's letter dated 4 April 2008 to Messrs Sandosh Anandan updated the plaintiff as to the status of the completion of the sale and purchase of the land between Sharma and D1. Messrs Ong & Manecksha informed the plaintiff that Sharma had not followed up with the removal of the other three caveats and that Sharma had purportedly alleged that the agreement which he had executed with D1, was invalid. D1 opined that Sharma had purposely tried to frustrate and scuttle the completion of the sale and purchase of the land and the settlement of the redemption sum to the plaintiff.

**[102]** On 30 April 2008 and 5 May 2008, the plaintiff through Messrs Sandosh Anandan's letters to Messrs Ong & Manecksha reminded them that the redemption statement in favour of CIMB Bank Bhd had expired on the

same day and asked them to revert with the status of the matter. In reply, Messrs Ong & Manecksha through its letter dated 6 May 2008 stated, among others, that D1 could not proceed with the payment to the plaintiff because Sharma had refused to cause the other private caveats to be withdrawn and had threatened to terminate the sale of the land to D1. Hence, D1 was unable to proceed with the payment of the redemption sum to the plaintiff. They asked the plaintiff to liaise directly with Sharma for further clarification on the matter.

SUIT 240

**[103]** On 8 May 2008, D1 filed a suit against Sharma via Penang High Court Suit No 22–240 of 2008 ('Suit 240') to, inter alia, specifically enforce the agreements entered between Sharma and D1, including the transfer of the land and *for Sharma to cause the plaintiff to furnish a redemption statement cum undertaking letter to D1 to confirm the amount payable to the plaintiff*. The plaintiff was not made a party or notified of Suit 240.

**[104]** On 27 May 2008, Sharma through his letter explained to the plaintiff that the sale to the 'Penang Buyer' (referring to D1) was off for various reasons, and that he was in the process of terminating the deal with D1 and looking for another buyer very quickly without delay. On 28 May 2008, Sharma wrote to the plaintiff and explained that he was purportedly 'cheated by' D1 and he would like to call the plaintiff's representative to explain and if possible, to meet up to resolve the matter quickly.

**[105]** A few days later, the plaintiff's representative, namely PW2, met with Sharma to discuss about settlement. Sharma told PW2 that he could not afford to buy back the land but still asked for another chance to get other purchasers to purchase the subject land. After discussions, Sharma and the plaintiff agreed to settle and resolve the matter. Among others, the plaintiff agreed to give Sharma a last chance to procure a new buyer and settle the debt with MAA as well as other caveators, including D1 within three months from 1 June 2008.

**[106]** In consideration, if Sharma failed to resolve this matter before or on 31 August 2008, Sharma agreed to relinquish all his rights, interests, and benefits over the land in favour of the plaintiff or the plaintiff's nominees.

**[107]** A power of attorney dated 17 July 2008 was granted by Sharma in favour of the plaintiff pursuant to the settlement terms agreed upon between the parties.

**[108]** A letter of settlement dated 17 July 2008 was executed by Sharma in favour of the plaintiff to confirm all the agreed terms of settlement. The letter

of settlement was attached as 'Annexure A' to the power of attorney dated 17 July 2008. The power of attorney and letter of settlement were stamped on the same day. The power of attorney was registered in the Kuala Lumpur High Court on 24 July 2008. Pursuant to para 14 of the letter of settlement dated 17 July 2008, Sharma and the plaintiff agreed that all the terms that had been agreed upon would be recorded as a consent judgment in Suit 775.

D1 APPLIES FOR SPECIFIC PERFORMANCE — SUIT 240

**[109]** On 31 July 2008, D1 filed a summons in chambers in Suit 240 against Sharma for, inter alia, an injunction to restrain him from dealing with the land and an order for specific performance of the agreements between Sharma and D1 including an order that *Sharma shall within 14 days from the date of the order cause the plaintiff to furnish a redemption statement cum undertaking letter addressed to D1 and its financier confirming the sum payable in order for the plaintiff to withdraw its private caveats and disclaim all interest in the said land.* According to the order, the plaintiff's confirmation was to be in such format which was acceptable to D1 and its financier. Sharma was also supposed to obtain a letter of consent from the plaintiff, in such format acceptable by the land office whereby the plaintiff consented to the registration of the transfer in favour of D1 and the registration of charge in favour of D1's financier.

CONSENT JUDGMENT — SUIT 775

**[110]** In the meanwhile, as per the settlement that was reached between the plaintiff and Sharma, a consent judgment was recorded in Suit 775 on 21 August 2008 ('the consent judgment'). In summary, the terms of the consent judgment were:

(a) Sharma agreed to pay the plaintiff the sum of RM10,256,098 as at 31 August 2008 based on the loan granted by the plaintiff;

(b) Sharma agreed to resolve and settle the issues with MAA and the third parties together with the caveators over the land within three months from 1 June 2008 and expiring on 31 August 2008;

(c) Sharma agreed to relinquish all his rights, interest and benefits over the land in favour of the plaintiff and/or the plaintiff's nominees at the expiry of the settlement period;

(d) Sharma agreed to grant the plaintiff a power of attorney over the land to deal, execute and to do all such things as may be required to dispose the land;

(e) Sharma was to procure the sale of the land within the settlement period together with 10% deposit payable to the plaintiff's solicitors as stakeholders pending completion of the sale;

(f) Sharma further agreed that the sale of the land shall be completed within three months from the date of the execution of the sale and purchase agreement;

(g) Sharma agreed that the plaintiff shall have the right to forfeit the deposit previously paid by the purchaser and held by the stakeholders in the event the balance purchase price of the land is not settled within three months from the date of the sale and purchase agreement;

(h) the plaintiff shall have the right to deal with the land in the manner as the plaintiff shall deem fit and right, in the event of non-completion of the sale and purchase agreement;

(i) the plaintiff shall have the right, power or discretion to take all necessary and relevant action against Sharma to compel him to strictly comply with the terms hereof; and

(j) each party shall bear its own costs.

**[111]** The effect of the consent judgment was that, if Sharma failed to get a buyer to buy over the land or to settle the sum of RM10,256,098.66 by 31 August 2008, beneficial ownership of the land would pass to the plaintiff. As it turned out, Sharma failed to procure a buyer to purchase the land or to settle the said sum before or even after 31 August 2008.

**[112]** On 3 September 2008, the plaintiff through Messrs Sandosh Anandan's letter informed MAA about the settlement that was reached between the plaintiff and Sharma including the settlement letter dated 17 July 2008, the power of attorney dated 17 July 2008 and the consent judgment dated 21 August 2008. Messrs Sandosh Anandan also sought an appointment to discuss the above said matter with MAA.

**[113]** After the said letter, the plaintiff's representatives met with the officers and directors of MAA a few times to discuss on the redemption of the land from MAA. They informed the plaintiff that they would consider giving the plaintiff a discount but had failed to state the actual amount to be paid. Some of them informed the plaintiff that they required approval from their superiors whilst some of them informed that the plaintiff may be required to pay an 'additional sum' apart from the official payment.

**[114]** The plaintiff then instructed its then solicitors, Messrs Sandosh Anandan to do the necessary. Sometime in or about December 2009, there was a dispute between one of the companies under the plaintiff's group, known as Horizon Terrace Sdn Bhd and Sandosh Anandan, because he failed to pay the real property gains tax for the said company despite having collected the necessary payment. The said company was summoned and fined. Pursuant

thereto, the plaintiff terminated Messrs Sandosh Anandan's services for all the companies under its group, including the plaintiff. A police report was also made against Sandosh Anandan. However, Messrs Sandosh Anandan did not return the complete file to the plaintiff. Thus, the plaintiff's file was incomplete. The caveat forms were not in the file. According to the plaintiff, the matter escaped the plaintiff's attention.

**[115]** In the meanwhile, Sharma was adjudicated bankrupt on 7 May 2010. He was again adjudicated a bankrupt on 22 October 2010.

**[116]** On 29 March 2011, the plaintiff changed their registered address from the old address 3rd Floor, Block Pasifik, Wisma Rampai, Jalan 34/26, Taman Sri Rampai, Setapak, 53300 Kuala Lumpur to 5th Floor, Lot 442, Kompleks Galleria, Jalan Pahang, 53000 Kuala Lumpur.

**[117]** This is evidenced by the plaintiff's Form 44 dated 29 March 2011 which was lodged with the Registrar of the Companies on 31 March 2011. The old address was left vacant since then. PW1 testified as to the sequence of the plaintiff's change of address.

ORDER DATED 19 SEPTEMBER 2011 (SUIT 240)

**[118]** On 19 September 2011, D1 obtained an order via its summons in chambers dated 31 July 2008 in Suit 240, against Sharma for, inter alia:

(a) (para (a)) *specific performance* of the agreements dated 6 August 2007; 30 January 2008; deed of settlement dated 30 January 2008 and letter dated 14 February 2008;

(b) (para (b)) transfer of the subject land; and

(c) (para (d)) *Sharma within 14 days from the date of the order, cause the plaintiff to furnish a redemption statement cum letter of undertaking addressed to D1 and its financier confirming the sum payable in order for the plaintiff to withdraw its private caveats and disclaim all interest in the said land in such format which is acceptable to D1 and its financier*, and a letter of consent in such format acceptable by the land office whereby the plaintiff consents to the registration of the transfer in favour of D1 and the charge in favour of D1's financier.

**[119]** According to the plaintiff, neither Sharma nor D1 had contacted the plaintiff for the redemption statement in compliance with the specific performance order.

**[120]** On 29 September 2011, the plaintiff changed its registered address again to its present registered address at 7th Floor, Lot 442, Wisma HRIH Lotus, Jalan Pahang, 53000 Kuala Lumpur. This is evidenced by the plaintiff's Form 44 dated 29 September 2011 which was lodged with the Registrar of the Companies on 11 October 2011.

**[121]** On 13 December 2011, D1 through its solicitors, Messrs Ong & Manecksha sent a letter to the Director General of Insolvency ('DGI') to, inter alia, request them to sign a few documents on behalf of Sharma. This included the 'Surat Beri Kuasa' to get the redemption statement from the plaintiff. It also requested the DGI to write to MAA and also the plaintiff to their address provided in the letter to ask for the issuance of redemption statement cum undertaking letter. The plaintiff's address which was provided by D1 in the said letter to the DGI was *the plaintiff's new registered address* at *5th Floor, Lot 442, Kompleks Galleria, Jalan Pahang 53000 Kuala Lumpur*. On 16 January 2012, D1 through Messrs Ong & Manecksha's letter to the DGI repeated the same requests. Similarly, the plaintiff's new registered address was provided by D1 in the said letter. These two letters show that D1 knew that the plaintiff had changed its registered address not later than December 2011. On 2 February 2012, Sharma's appeal to the Court of Appeal against the decree of specific performance order was struck out.

D2'S LETTER OF OFFER 17 JULY 2012

**[122]** In the meanwhile, D1 had proceeded to obtain an Islamic banking facility from CIMB Islamic Bank Bhd. The facility comprised of different loan products. One of the products was an Islamic Term Financing which is abbreviated in the letter of offer as 'TF-i'.

**[123]** By a *letter of offer dated 17 July 2012* (which was disclosed only at the trial), D2 approved banking facilities to D1 for the purposes, inter alia, to *redeem from the plaintiff* and to part finance the purchase of the land.

**[124]** The letter of offer expressly stated that the *purpose of TF-i* was '*To redeem* from Malaysia Assurance Alliance Bhd, *IB Capital Sdn Bhd* (including the accrued interest) and to part finance the purchase of a piece of freehold vacant land at Kebun Bunga Pulau Pinang'. The letter of offer contained, inter alia:

(a) a condition precedent in para 12 for 'submission of DGI approval/confirmation for the disbursement of the balance purchase price to settle payments to MAA, *IB Capital* and other private caveators'; and

(b) a condition precedent in para 15 for procurement of a letter of undertaking from MAA, *IB Capital* and Ivory Indah Sdn Bhd to refund

the bank in the event that the transfer and charge cannot be created in favour of the bank.

**[125]** In the meanwhile, the plaintiff's caveats lapsed on or about 17 July 2012 and 29 November 2012, respectively.

OS 2106

**[126]** On 3 December 2012, D1 filed an originating summons against the plaintiff in Penang High Court via OS No 24–2106–12 of 2012 ('OS 2106') to remove the plaintiff's caveats (*which had already lapsed*) and to restrain the plaintiff from entering any further caveats. On 26 December 2012, D1 filed an affidavit of service stating that the OS 2106 and supporting affidavit for removal of the plaintiff's caveats had been served by registered post to the plaintiff's alleged address at *3rd Floor, Block Pasifik, Wisma Rampai, Jalan 34/26, Taman Sri Rampai, 53300, Wilayah Persekutuan, Kuala Lumpur*. According to the plaintiff, D1 knew not later than December 2011, that the plaintiff had changed its address.

**[127]** The said old address was no longer used by the plaintiff and was vacant then. D1 subsequently filed another affidavit of service affirmed on 7 January 2013 stating that D1's solicitors, Messrs Ong & Manecksha's letter dated 27 December 2012 informing the plaintiff of the new hearing date of OS 2106 on 11 January 2013, had been served by certificate of posting to the plaintiff's (old) address at 3rd Floor, Block Pasifik Wisma Rampai, Jalan 34/26, Taman Sri Rampai, 53300, Wilayah Persekutuan, Kuala Lumpur.

**[128]** The plaintiff contended that D1 knew not later than December 2011 that the plaintiff had changed its address. The said old address was no longer in use and was vacant then. On *22 January 2013*, D1 obtained an order to remove the plaintiff's caveats (*albeit that they had already lapsed in 2012*) and to restrain the plaintiff from entering any further caveats on the land.

**[129]** On 25 February 2013, D1 filed yet another affidavit of service stating that D1's solicitors, Messrs Ong & Manecksha's letter dated 14 January 2013 to inform the plaintiff of the hearing date of OS 2106 on 22 January 2013 had been served by certificate of posting to the plaintiff's (old) address at 3rd Floor, Block Pasifik Wisma Rampai, Jalan 34/26, Taman Sri Rampai, 53300, Wilayah Persekutuan, Kuala Lumpur. The plaintiff contends that D1 knew since not later than December 2011, that the plaintiff had changed its address. The said old address was not in use and was vacant then. According to the plaintiff, they were never served and had no knowledge of the matter, and did not have the opportunity to oppose OS 2106.

ANCILLARY ORDER (SUIT 240)

**[130]** On 2 May 2013, D1 obtained an ancillary order in Suit 240 to give effect to the specific performance order dated 19 September 2011. The High Court's Registrar was authorised to execute the transfer form and other necessary documents for and on behalf of Sharma. *Significantly, the ancillary order made no mention of the plaintiff's redemption statement or payment of any redemption sum to the plaintiff.*

**[131]** On 5 August 2013, Messrs Zaid Ibrahim & Co. (D2's solicitors) via their letter to D2 stated that D1 through its solicitors, Messrs Ong & Manecksha's letter dated 5 August 2013, proposed that the registration of the court orders for the removal of caveats (including the plaintiff's caveats) be presented together with the registration of the discharge of charge by MAA, transfer of the land to D1, and the fresh charge over the land by the bank (D2) instead of presenting the court order for the removal of caveats prior to the release of the Term Financing-i (the loan).

**[132]** By the general facility agreement dated 6 August 2013, D2 granted banking facilities of RM76m to D1 to be secured by a charge of the subject land. Schedule 1, item 6 of the general facility agreement specifically referred to the sale and purchase agreement dated 6 August 2007, *the agreement dated 30 January 2008* and the deed of settlement dated 30 January 2008 between D1 and Sharma. However, DW2 (being D2's witness) denied that D2 had knowledge of D1's documents although referred to in D2's own documents.

REGISTRATION OF TITLE/CHARGE — 5 SEPTEMBER 2013

**[133]** On 5 September 2013, the following instruments were registered and entered over the land:

(a) the transfer of the land in favour of D1; and

(b) the charge of the land by D1 to D2 to secure a loan of RM102,611,251.32 (see Form 16A (charge) dated 20 August 2013 together with charge).

**[134]** During arguments before us, counsel for the plaintiff pointed out that D2's letter of offer dated 17 July 2012 had expressly stated that the purpose of TF-i was to pay the redemption sum to the plaintiff and to MAA. However, D2's supplementary letter of offer dated 5 August 2013 did not mention any payment of redemption sum to the plaintiff. He then said that it was curious that in the Schedule to the Annexure to Charge, it was stated in [4] that the 'Date of the letter of offer' was *17 July 2012*. When this was raised during arguments before us, counsel for D2 took umbrage with this revelation. She

objected. We were given the impression that counsel for the plaintiff had sprung a surprise.

**[135]** Counsel for D2 said the date of the letter of offer (per the Schedule to the Charge Annexure) was not put to DW2 when he testified. She said that there could well be a valid explanation if this was put to DW2. On this point, although it was not mentioned by the plaintiff's counsel, we noted that further down in [6] of the Annexure to the Charge under 'Security Documents', the first document in the list of *Security Documents* is the 'letter of offer dated 17 July 2012'.

**[136]** Thus, the question is — since D2 had issued the supplementary letter of offer dated 5 August 2013 (which made no reference to payment of redemption sum to the plaintiff), why was the letter of offer dated 17 July 2012 mentioned in the Schedule to the Annexure to the Charge?

**[137]** This is of course quite perplexing. It cried out for answers. We therefore trawled through the (trial) notes of evidence. What we discovered was that contrary to the objection that was raised before us, counsel for the plaintiff had specifically and pointedly alluded to this issue during cross-examination of DW2. And this can be seen from the transcript of the notes of evidence which reads:

> PC: if you refer to the F1, page 266, 265 and 266, 265 item 4, this is the charge annexure, filed in the land office, if you look at item 4, *the only letter of offer mentioned here is the one dated 17th July 2012, right*?
>
> DW2: *ya*
>
> PC: Yes ya! And if you look at page 266, *security documents* ya, para 6, also *the only letter of offer mentioned is 17th July 2012*?
>
> DW2: *yes*
>
> PC: so, *the supplementary letter of offer has never been mentioned in the charge annexure agree*?
>
> DW2: *ya*

**[138]** In re-examination, DW2 tried to explain that the letter of offer dated 17 July 2012 made reference to the utilization of the banking facility to pay the redemption sum to the plaintiff because that was something which was insisted upon by D2's customer, D1. Now, it is necessary to mention yet again, that DW2 did not co-sign the letter of offer dated 17 July 2012. The signatories of the letter of offer dated 17 July 2012 were Veera and Azhar. So how did DW2 know this? This underscored the point made earlier that Veera should have, but did not testify.

**[139]** Further, during re-examination, DW2 only sought to explain that

A although D2 was given a copy of the order dated 19 November 2011 in Suit 240, there was nothing that D2 had to do thereunder, and that it was Sharma's (DGI's) duty to procure the redemption statement from the plaintiff. More importantly, in so far as the Annexure to the Charge is concerned, DW2 did not (*and could not*) explain why the Annexure to the Charge referred to the B letter of offer dated 17 July 2012 when it should have been the supplementary letter of offer dated 5 August 2013.

**[140]** And so, in the end, the position which obtained is that counsel for the C plaintiff had posed the right questions to DW2 and got the answers that he wanted. But DW2 did not make use of the opportunity to explain why the Annexure to the Charge referred to the letter of offer dated 17 July 2012 instead of the supplementary letter of offer dated 5 Aug 2013. It may be recalled that it was expressly stated in the letter of offer dated 17 July 2012 that D the 'purpose' of the TF-i facility was to enable D1 to purchase the land and *to facilitate the payment of the redemption sums to MAA and to the plaintiff as well*.

**[141]** As such, we find that there was no basis for D2' counsel's objection since it was quite appropriate (*and indeed in the present context, wholly necessary*) for E counsel for the plaintiff to have drawn our attention to the fact that the Annexure to the vharge referred to the letter of offer dated 17 July 2012. Clearly, the letter of offer dated 17 July 2012 is a 'smoking gun' document as *it fixed D2 with actual knowledge that the plaintiff had a claim over the land and that a redemption sum was payable to the plaintiff*. In the circumstances, since it F was raised and DW2 was confronted with this fact during cross-examination, the point should not have come as a surprise.

**[142]** But DW2 offered no explanation when he was cross-examined by G counsel for the plaintiff. We should add that counsel for the plaintiff did not prevent DW2 from offering an explanation during cross-examinations. As such, the result is that there was no explanation. Hence, we proceeded on the footing that it is the letter of offer dated 17 July 2012 which is the operative document per the Annexure to the Charge. Indeed, there can be no other H conclusion since we have to take the documents as we find them. At any rate, the real issue is whether based on the documents that they had access to or had knowledge of, D2 was aware of, or had knowledge of the fact that the plaintiff had an interest or was claiming an interest in and over the land, or that at the very least, that a redemption sum was due and payable to them. It was I submitted for the plaintiff that a reading of the loan documents between D2 and D1 in their entirety, demonstrated convincingly that prior to the creation of the charge, D2 was aware that part of the loan facility was to be paid to the plaintiff to settle its interest and claims over the land.

**[143]** In this regard, the primary documents which reveal D2's knowledge are plaintiff's caveats, the letter of offer dated 17 July 2012, the GFA, the Annexure to the Charge and the agreement dated 30 January 2008 between Sharma and D1, which was referred to in the GFA. Indeed, DW2 agreed that the plaintiff's caveats were a problem as they were a restraint on dealings such that the discharge of the MAA charges, the registration of transfer from Sharma to D1, and registration of the legal charge in favour of D2 would have all been legally impossible. There is no doubt that prior to 5 September 2013, D2 was well aware of all the encumbrances on the land. D2 was aware of the plaintiff's caveats and the agreement dated 30 January 2008 and the Order dated 19 September 2011 in Suit 240.

**[144]** Counsel for D2 said that it was unfair for the plaintiff to fix D2 with knowledge because the plaintiff was relying on cl 1.6 of the agreement dated 30 January 2008 which was 'buried' within that document. However, as the judge correctly observed, in a multi-million loan transaction, she would have expected D2 to have 'microscopically' examined all the documents. Of course, the judge's remark was in reference to Sharma's/D1's contractual documents and the various court orders in Suit 240, OS 2106 etc, but we would think that quite apart from anything else, it would have been elementary that D2 would have conducted a land search, and apprised themselves of all the encumbrances which were on the land and of the basis for entry of any restraint on dealings. We shall return to this theme in the later part of this judgment. Put tersely, it was incumbent upon D2 to have studied all the documents with a view to flagging out all the legal hotspots and impediments.

**[145]** We shall move on.

**[146]** On 10 October 2013, the plaintiff instructed Messrs Winston Ng & Teoh to conduct a land search to ensure that the plaintiff's caveat was still in place and if expired, to enter a fresh caveat. From the result of the land search, the plaintiff discovered that its second caveat had already expired on 30 November 2012.

**[147]** In any event, D1 had obtained an order dated 22 January 2013 via OS 2106 to remove the plaintiff's caveats and to restrain the plaintiff from entering new caveats. It was also discovered that the land had been transferred to D1 and charged to D2 as of 5 September 2013.

**[148]** On or about 23 October 2013, the plaintiff instructed Messrs Winston Ng & Teoh to conduct a court file search. From the court file search results, the plaintiff discovered that D1 had obtained orders against Sharma via Suit 240 for specific performance of the sale and purchase agreement between them and for transfer of the land.

**[149]** The plaintiff also discovered that D1 obtained an Order in OS 2106 to remove the plaintiff's caveats and to restrain the plaintiff from entering new caveats which was allegedly served by D1 to the plaintiff's previous registered address.

**[150]** Upon the aforesaid discoveries, the plaintiff appointed its then solicitors, Messrs Ibrahim & Fuadah to take necessary actions to protect its interest in the land. Upon the solicitors' advice, Suit 20 was filed by the plaintiff against D1 and D2 on 29 January 2014.

THE PLEADINGS

**[151]** We turn now to the pleadings. The plaintiff's pleaded case was as follows:

> Re Amended Statement of Claim (amended 24 May 2018)
>
> (1) ...
>
> (2) ...
>
> (3) ...
>
> (4) At all material times. KK Sharma (whose full name is Dato Krishna Kumar al T.N. Sharma, NRIC No. 38973181400801-71-5341) was the registered proprietor of all that land held under GRN 1272 for Lot No. 2838. Mukim 18. Daerah Timur Laut. Negeri Pulau Pinang ('the subject land'). On 9 May 2006. KK Sharma borrowed RM5million from the plaintiff. He promised to repay the plaintiff by 9 November 2006. He granted the plaintiff an irrevocable option to purchase the subject land. He also granted the plaintiff a power of attorney which enabled the plaintiff to deal with the subject land in the event of default by KK Sharma. The plaintiff entered a private caveat against the title to the subject land.
>
> (5) Later, the loan was converted into a sale and purchase of the subject land because KK Sharma was unable to repay the loan. The sale and purchase agreement is dated 2 October 2006. It is in writing. The purchase price was RM50 million. That agreement gave KK Sharma the option to repurchase the subject land within 3 months at the price of RM50 million. At that point in time, KK Sharma had borrowed RM8.8 million from the plaintiff. That sum was capitated as forming part of the purchase price. Pursuant to the sale and purchase agreement, the plaintiff entered a private caveat against the title to the subject land.
>
> (6) KK Sharma did not repurchase the subject land within 3 months. The plaintiff therefore became the beneficial owner in law of the subject land and KK Sharma held the same as a constructive trustee for the plaintiff.
>
> (7) On 14 March 2007, KK Sharma entered into a joint venture with the first defendant on the basis that he was the registered proprietor and the beneficial owner of the subject land. In truth and fact, KK Sharma was not the beneficial owner and had no title in equity to the subject land by reason of the matters pleaded in paragraph 6. At the time it entered into the joint-venture agreement with KK Sharma, the first defendant had knowledge or means of knowledge of the plaintiff's

beneficial ownership of the subject land. Accordingly, in law the first defendant became a constructive trustee and held the subject land in trust for the plaintiff.

(8) On 6 August 2007, KK Sharma entered into a sale and purchase agreement with the first defendant under the terms of which he agreed to sell the subject land to the first defendant for RM75 million. This was followed by a supplementary agreement dated 30 January 2008. The subject land was transferred to the first defendant and registered in its favour on 5 September 2013. At that time, KK Sharma had no title in equity to effect the sale to the first defendant because the plaintiff was the beneficial owner of the subject land and KK Sharma was a constructive trustee for the plaintiff. At the time the sale and purchase agreement was executed, the first defendant had knowledge or means of knowledge of the plaintiffs beneficial ownership to the subject land. The first defendant is therefore not a bona fide purchaser of the subject land. Further, the first defendant as constructive trustee held the subject land on trust for the plaintiff.

(9) In 2007, KK Sharma brought an action against the plaintiff herein and Datuk Seri Wong Yeon Chai in Kuala Lumpur High Court Civil Suit No. S5-22-775-2007. That suit was compromised and on 21 August 2008, consent judgment was entered on the following terms:

(1) KK Sharma agrees to pay the plaintiff herein the sum of RM10,256,098 as at 31.8.2008 based on the loan granted to KK Sharma by the plaintiff herein.

(2) KK Sharma agrees to resolve and settle the issues with Malaysian Assurance Alliance Bhd and the third parties together with the caveators over the subject land within three (3) months commencing from 01.06.2008 and expiring on 31.08.2008 ('settlement period').

(3) KK Sharma agrees to relinquish all his right, interest and benefits over the subject land in favour of the plaintiff herein and/or its nominees at the expiry of the settlement period.

(4) Thereafter, KK Sharma agrees to grant the plaintiff herein a power of attorney over the subject land to deal, execute and to do all such things as may be required to dispose the subject land.

(5) KK Sharma is to procure the sale of the subject land within the settlement period together with ten percent (10% deposit ('deposit') payable to the plaintiff's solicitors as stakeholders pending completion of the sale.

(6) KK Sharma further agrees that the sale of the subject land shall be completed within 3 months from the date of the execution of the sale and purchase agreement.

(7) KK Sharma agrees that the plaintiff herein shall have the right to forfeit the deposit previously paid by the purchaser and held by the stakeholders in the event the balance purchase price of the subject land is not settled within three

(8) months from the date of the sale and purchase agreement.

(9) The plaintiff herein shall have the right to deal with the subject land in the manner as the plaintiff herein shall deem fit and right, in the event of non-completion of the sale and purchase agreement.

(10) The plaintiff herein shall have the right power or discretion to take all necessary and relevant action against KK Sharma to compel KK Sharma to strictly comply with the terms hereof.

(11) Each party shall bear its own costs.

(10) The first defendant obtained a loan from the second defendant to effect the purchase of the subject land. It created a registered charge over the subject land in the second defendant's favour on 5 September 2013. *At the time of the creation of the charge, the second defendant had knowledge or means of knowledge of the plaintiff's beneficial ownership to the subject land. The second defendant is therefore not a bona fide purchaser of the charge and the said charge is therefore defeasible. Further the second defendant is the constructive trustee of the subject land for the plaintiff. The second defendant at all material times acted in breach of trust as a constructive trustee by creating the charge in violation of the beneficial ownership of the plaintiff.*

(11) Further, *the second defendant had knowledge or means of knowledge at all material times that the plaintiff was the beneficial owner of the subject land and that the first defendant had no title in equity to create the aforesaid charge. The second defendant acquired its knowledge of the plaintiff's beneficial ownership because, prior to the creation of the charge, it had in its possession all relevant documents, including the agreement dated 30 January 2008* between KK Sharma and the first defendant which referred to the plaintiff's interest. *The second defendant accordingly took no title from the first defendant because the first defendant had no title to create a charge. The aforesaid charge of the second defendant is therefore null and void and of no effect by reason of section 340(2b) of the National Land Code. In any event the second defendant not being a bona fide purchaser for value acquired no title to the aforesaid charge. Further, as already pleaded, the second defendant as constructive trustee is liable to restore the subject land to the plaintiff free of any encumbrance, including the aforesaid charge.*

(12) *At all material times, the relevant documents in the possession of the first and second defendants referred to the plaintiff's interest in the subject land as being redeemable.* But in law, the label ascribed by the first and second defendants to the plaintiff's interest in the subject land is inconclusive and not binding upon the plaintiff and this Honourable Court. *The true nature of the plaintiff's interest is that of beneficial owner of the subject land and not merely an interest capable of redemption. In any event, as constructive trustees of the subject land for the plaintiff, the first and second defendants cannot assert any right, title or interest, registrable or otherwise against the plaintiff.*

(13) By reason of the matters pleaded hereinbefore, the plaintiff is entitled to be registered as proprietor of the subject land free of all encumbrances. Further the plaintiff is entitled in law to set aside the transfer and registration of the title to the subject land in D1's favour and to set aside the registered charge in the second defendant's favour.

THE RELIEFS

**[152]** The reliefs sought in Suit 20 per the re-amended statement of claim, *against D1* are:

(i) A declaration that the plaintiff is the beneficial owner of all that land held under GRN 1272 for Lot No. 2838 Mukim 18 Daerah Timur Laut Negeri Pulau Pinang (the subject land);

(ii) A declaration that the transfer of the land registered in the first defendant's favour is null and void and of no effect;

(iii) As order that the issue and register documents of title to the land be rectified by cancelling the first defendant as the registered proprietor and inserting a memorial in favour of the plaintiff as registered proprietor;

(iv) An order directing the first defendant to surrender or cause to be surrendered the issue document of title to the appropriate land authority to give effect to the order claimed under prayer (ii) hereof;

(v) Damages in addition to or in lieu of specific relief;

(vi) Costs of this action; and (vii) Further or other relief as this Honourable Court deems fit and just.

**[153]** The *reliefs sought against D2* are:

15. And the plaintiff claims the following relief against the second defendant:

(i) A declaration that the plaintiff is the beneficial owner of all that land held under GRN 1272 for Lot No. 2838, Mukim 18, Daerah Timur Laut, Negeri Pulau Pinang (the subject land);

(ii) A declaration that the charge registered in the second defendant's favour is null and void and of no effect;

(iii) An order directing the Registrar of Title under section 417 of the National Land Code to cancel the memorial of charge appearing in the register and issue documents of title to the subject land;

(iv) An order directing the second defendant to surrender the registered charge and the issue document of title to the land in its possession to the appropriate land authority to give effect to the relief claimed in prayer (II);

(v) Costs of this action; and

(vi) Further and other relief as this Honourable Court deems fit and just.

**[154]** The plaintiff also sought (per para 16) the relief of *equitable compensation* (for breach of trust) against D1 and D2. The prayer reads as follows:

16. And the plaintiff claims against both defendants, the specific relief of equitable compensation for breach of trust in addition to other forms of specific relief claimed hereinbefore.

**[155]** We turn now to D1's defence. The defence may be summarised as follows. At the outset, D1 did not disavow or deny any knowledge of the plaintiff's caveats. Essentially, D1 relied upon the sale and purchase agreement dated 6 August 2007, the agreement dated 30 January 2008 and the deed of settlement of the same date, the principal order dated 19 September 2011 in Suit 240 and the ancillary order dated 2 May 2013 in Suit 240. D1 also alluded to Sharma's obligation as per para (d) of the order dated 19 September 2011 wherein he (Sharma) was to procure the redemption statement from the plaintiff.

**[156]** D1 said that Sharma failed to comply with order. Sharma was adjudicated a bankrupt and it was then up to the DGI to ensure that Sharma's duties which arise under the order dated 19 September 2011 are implemented. D1 asserted that that the DGI failed to carry out their duties. D1 disavowed any knowledge about the consent judgment 21 August 2008 in Suit 775. D1 maintained that there was no privity of contract between D1 and the plaintiff and that the statutory rights of D1 and D2 vis a vis the land cannot be challenged and that D1's right and title over the land was indefeasible.

**[157]** D1 maintained that the plaintiff had no interest in and over the land. D1 also raised a plea of res judicata and issue estoppel. According to D1 all the issues that were raised in Suit 20 ought to have been raised in OS 2106 wherein D1 applied to remove the plaintiff's caveats. D1 also stated that Suit 20 was only filed after D1 had taken banking facilities from D2 and utilised part of it to pay the redemption sum to MAA so that the MAA charges are discharged. Essentially, D1 was purporting to suggest that since the MAA charges had been discharged, the plaintiff was utilising Suit 20 to gain ownership of the land for 'free'.

**[158]** According to D1, Suit 20 was actuated by bad faith on the plaintiff's part and was intended to undo the specific performance order dated 19 September 2011, the Court of Appeal order dated 2 February 2012, the ancillary order dated 2 May 2013 and the order dated 22 January 2013 in OS 2106 for removal of, inter alia, the plaintiff's caveats. Further, it is alleged that the plaintiff had not given the particulars or the basis for the sum of RM10,256,098.66 (as at 31 August 2008). According to D1, they were not precluded by law from taking a banking facility and using the land as collateral.

**[159]** D1 also stated that the plaintiff had not approached the court with 'clean hands' and that the plaintiff was seeking to unjustly enrich themselves. Finally, D1 raised the plea of limitation.

**[160]** We turn now to D2. D2's defence was as follows:

> 4. Save that Dato' Krishna was the registered proprietor of the Land and there were two caveats dated 18.7.2006 and 30.11.2006 entered by the Plaintiff on the Land ('the Plaintiff's Caveats') and that the plaintiff's Caveats have been validly removed, the 2nd Defendant has no knowledge at the material times of the averments in paragraphs 4 to 6 of the Re-Amended Statement of Claim and the Plaintiff is put to strict proof thereof. The Plaintiff has not set out its alleged caveat able interest over the Land. *The 2nd Defendant is not aware of the plaintiff and or its alleged interest in the Land and denies that the plaintiff is the beneficial owner of the Land.*
>
> 5. Further, insofar as the 2nd Defendant is concerned, the 2nd Defendant was informed by the 1st Defendant of the following:
>
> (a) the 1st Defendant had applied to remove the plaintiff's Caveats and that the caveat removal application had been properly served.
>
> (b) the Court had on 22.1.2013 ordered that the Plaintiff's Caveats be removed and that the Plaintiff be prohibited from entering any further caveats on the Land ('the Removal of Caveat Order'). It is evident that the plaintiff did not have caveat able interest over the Land.
>
> (c) The Plaintiff has not appealed against the said Removal of Caveat Order of 22.1.2013.
>
> (d) In any event, both the Plaintiff's Caveats had in fact already expired latest by 18.7.2012 and 30.11.2012 respectively, even before the 1st Defendant obtained the Removal of Caveat Order.
>
> 6. Save that Dato' Krishna, the registered proprietor of the Land, entered into a Sale and Purchase Agreement dated 6.8.2007 with the 1st Defendant and the Land was validly transferred to the 1st Defendant on 5.9.2013 (after the 2nd Defendant allowed drawdown of the Facilities to redeem MAA's charge over the Land) the rest of the averments in paragraphs 7 and 8 of the Re-Amended Statement of Claim are denied and the Plaintiff is put to strict proof thereof.
>
> 7. The 2nd Defendant is bona fide and paid valuable consideration and is a legitimate charge of the Land, whose registered interest over the Land taking priority over any alleged interest (if any) of the Plaintiff.
>
> 8. The 2nd Defendant has no knowledge at the material times of the matters set out in paragraph 9 of the Re-Amended Statement of Claim and the Plaintiff is put to strict proof thereof. In any event, from a perusal of the averments therein, the 2nd Defendant states that:
>
> (a) The alleged power of attorney dated 17.7.2008 purportedly granted to the Plaintiff by Dato' Krishna could not have been issued pursuant to the stated Consent Judgment, as the Consent Judgment 21.8.2008.

(b) It appears that neither Dato' Krishna nor the Plaintiff had complied with or enforced the stated Consent Judgment of 21.8.2008.

(c) The stated Consent Judgment of 21.8.2008 and the purported power of attorney do not confer any legal interest in the Land on the Plaintiff.

9. Save that the 2nd Defendant has duly granted the Facilities to the 1st Defendant to finance the purchase of the Land and the repayment of the Facilities is secured by the Charge executed by the 1st Defendant in favour of the 2nd Defendant, paragraphs 10 to 13 of the Re-Amended Statement of Claim are categorically denied and the Plaintiff is put to Strict proof thereof. The 2nd Defendants states that:

(a) the 2nd Defendant never had any dealing or relationship with the Plaintiff with regard to the Land;

(b) *the 2nd Defendant was never at any material time informed of or was privy to the purported relationship and/or dealings (if any) between Dato Krishna and the Plaintiff and/or the 1st Defendant*;

(c) save and except for matters which are reflected on and consistent with the documents lodged and/or registered with the relevant land office, *the 2nd Defendant has no knowledge of the various allegations made by the Plaintiff with regard to its purported 'interest in the Land and/or its dealings with Dato' Krishna and/or between Dato' Krishna and the 1st Defendant*;

(d) the 2nd Defendant was never at any material time informed of or made aware of the Plaintiff's alleged interest in or claim over the Land when the 2nd Defendant's charge over the Land was created;

(e) the 2nd Defendant has at all material times acted in good faith in making available the Facilities to the 1st Defendant and in accepting the Charge over the Land;

(f) the Charge is valid and indefeasible:

(g) the 2nd Defendant is at all material times a bona fide registered chargee and is a 'purchaser' who has in good faith and for valuable consideration acquired a legal interest in the Land.

(h) *The 2nd Defendant is not liable to the Plaintiff whether as constructive trustee or otherwise*,

10. Paragraphs 14 and 15 of the Amended Statement of Claim-are wholly denied and the 2nd Defendant repeats the averments in paragraph 3 to 4 above herein. The 2nd Defendant further states as follows:

(a) The matters raised by the Plaintiff in the Re-Amended Statement of Claim Plaintiff's allegations ought to have been raised in the 1st Defendant's action to remove the plaintiff's Caveats but the Plaintiff had not done so and is barred by res judicata and issue estoppel from doing so herein.

(b) It cannot be disputed that the earlier charge in favour of MAA was only redeemed by using the monies disbursed under the Facilities granted by the 2nd Defendant.

(c) The Plaintiff's action in only filing this action now to claim for the Land free of encumbrances after the MAA charge had been redeemed by the 1st Defendant (utilizing the Facilities granted by the 2nd Defendant) is clearly in bad faith and is an attempt to circumvent the Removal of Caveat Order of 22.1.2013 obtained by the 1st Defendant.

(d) *The Plaintiff has failed to show that it has any interest in the Land which would entitle the plaintiff to ownership of the Land or to enter a caveat on the Land*.

(e) The transfer of the Land to the 1s Defendant and the Charge to the 2nd Defendant are valid and cannot be set aside. The 2nd Defendant had relied upon the validity of the Charge in allowing drawdown of the Facilities and the rights of the 2nd Defendant as the legal chargee of the Land cannot be disputed.

(f) *The 2nd Defendant has indefeasible interest in the Land as it is a bona fide party who had obtained the Charge without notice of any pending or alleged interest of the Plaintiff in the Land and had given good consideration for the Charge*.

11. Further or alternatively, even if the plaintiff can show that it has any legal interest in the Land which takes priority to the interest of the 1st Defendant and/or the 2nd Defendant (which is denied), the 2nd Defendant contends that the plaintiff is still not entitled to the Land free of encumbrances as the Plaintiff would be unjustly enriched by the redemption of MAA Charge over the Land from the MAA charge using the Defendants' monies.

12. *The Plaintiff is also not entitled to any relief by reason of its delay herein and due to the limitation period having set in*.

13. The Plaintiff is accordingly estopped from filing this action against the 2nd Defendant.

**[161]** D2 filed a counterclaim and sought the following orders:

(a) A declaration that in the event the Plaintiff is adjudicated herein to have priority to the land held under Geran 1272, Lot 2838, Mukim 18, Daerah Timur Laut Negeri Pulau Pinang ('the Land') over the interests of the Defendants herein, that the Plaintiff is not entitled to the Land until the Plaintiff has paid a sum of RM40 million to the 2nd Defendant, being the sum paid by the 2nd Defendant to MAA towards redemption of the MAA charge over the Land;

## SUMMARY OF THE JUDGE'S FINDINGS

**[162]** The judge decided that the main issue to be determined was whether the plaintiff was the beneficial owner of the land. The judge made the following findings:

(a) without payment of the full purchase price, the plaintiff did not acquire any beneficial interest in the land;

(b) the powers of attorney granted by Sharma to the plaintiff did not confer any legal or beneficial right to it as the powers of attorney only meant that Sharma appointed the plaintiff as his agent to deal with the land on his behalf. But Sharma remained as the registered owner of the land;

(c) as the registered owner, Sharma had the right to sell the land to anyone he liked;

(d) the unenforced consent judgment was only a 'paper judgment' which did not confer on the plaintiff any legal or beneficial right to the land;

(e) the plaintiff failed to act swiftly. On the other hand, D1 acted expeditiously;

(f) the various court orders for specific performance obtained by D1 were valid and enforceable as those orders were obtained in accordance with due process of law and were not set aside; and

(g) the plaintiff failed to prove that it had any beneficial interest in the land.

GROUNDS OF JUDGMENT

**[163]** The conclusions of the judge may be gathered from the following parts of the grounds of judgment which read as follows:

> It is trite law that only upon full payment of the purchase price, the buyer will obtain any beneficial interest in the property, see *Chua Hee Hung & Ors v QBE Supreme Insurance Berhad* [1990] 1 MLJ 480; *Pengarah Tanah dan Galian Negeri Kedah & Anor v Emico Development Sdn Bhd* [2000] 1 MLJ 257.
>
> On the facts and the law, I agree with the defendants [*sic*] submission that *without payment of the full purchase price which could redeemed the MAA Charge, the plaintiff did not have any beneficial interest in the land. The sale and buy back agreement was not completed and expired after the lapse of the completion date. It is as good as the agreement does not exist.*
>
> ...
>
> Consent Judgment
>
> It is an undisputed fact that when the consent judgment was entered on 21 August 2008, Sharma had already sold the land to the first defendant pursuant to the sale and purchase agreement dated 6 August 2007. Most importantly, the plaintiff did not enforce the consent judgment against KK Sharma. This fact is admitted by PW1 and PW2. *So, what the plaintiff has is only a paper judgment which do not confer on the plaintiff any legal or beneficial right to the land.*
>
> Constructive Trust
>
> The plaintiff, in its pleading and written submission argued that Sharma hold the land in trust for the plaintiff and that the various court orders obtained by the first

defendant is null and vold and of no effect. I find no merit at all in these argument. The fact revealed, at the material time, the plaintiff was represented by lawyer Sandosh Anantham. In his evidence, PW2 said he knew the land was charged to MAA and that either Sharma or the plaintiff must redeemed MAA Charge before Sharma can sell the land to the plaintiff. He also knew Sharma wanted to sell the land to the first defendant as early as in 2007. PW2 further said the plaintiff can pay more than RM40 million to redeem MAA Charge. But, from 2006 to 2014, the plaintiff did nothing to effect its purchase of the land. PW2 blamed his lawyer, Sandosh Anantham for not doing the job. The problem with the plaintiff is the plaintiff did not act swiftly like the first defendant. The plaintiff only rely on paper judgment to get a piece of land. Without any action to enforce the judgment, the judgment remains as a paper judgment only. To the contrary, knowing Sharma will not comply with the court order, the first defendant obtain various court orders for specific performance to compel MAA to give a redemption statement. These court orders are valid and enforceable as it was done and obtained in accordance with due process of the law.

*By their conduct, the first defendant has shown their desire, ability, commitment and determination to complete the sale. What right does the plaintiff has to say those court orders are null and void when the orders were not set aside by court of law?* On the background facts, I find Sharma never hold the land as constructive trustee for the plaintiff. Instead, the true position is Sharma is the registered owner of the land and is entitled to sell the land to the first defendant.

Decision

*This is simply a case of the plaintiff had been extremely slow in its action to purchase the land. The plaintiff had not paid a single cent to redeem the MAA Charge. Only after the first defendant had paid more than RM46m to redeem the MAA Charge (with the loan granted by the second defendant), the plaintiff now says the land belongs to them.* Why should this court give the land free of charge to the plaintiff. This court will not assist an indolent party. Based on the totality of evidence, *the plaintiff failed to prove it has any beneficial interest in the land*. Accordingly, I dismiss the plaintiff's claim with cost of RM60,000 to each defendant. I also dismiss the second defendant's counterclaim as it has become academic.

## THE ARGUMENTS

**[164]** We will start with the complaints that were advanced by counsel for the plaintiff and the legal submissions that were made in relation to the claim based on a constructive trust. Counsel criticised the judgment of the High Court by contending that no reasonable tribunal properly directing itself on the law and the facts would have arrived at the conclusions which were reached by the judge.

**[165]** Counsel's first complaint was that the judge did not read all the documents together as a whole. He said that the High Court should have considered and read all the documents together as a whole, not separately in isolation. This includes the SPBA; the powers of attorney; and the consent

judgment dated 21 August 2008 (Suit 775) which perfected the plaintiff's beneficial interest in the land. All those documents should have been considered in totality since they were all inter-connected. The law is clear. Where documents formed part of the same transaction, they should be read together. See: *Glamour Green Sdn Bhd v Ambank Bhd & Ors and another appeal* [2006] MLJU 649; [2007] 3 CLJ 413; [2007] 2 AMR 521 (CA) and *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165; [1970] 1 LNS 82. Counsel said that those documents show unequivocally that the land was vested in the plaintiff.

**[166]** Counsel said that the judge misdirected herself was when she held that the plaintiff had to pay the full purchase price to acquire *any* beneficial interest in the land. In this regard, the judge erred in focusing on whether the balance of the purchase price was paid, because once a sale and purchase agreement is executed, beneficial interest vests in the purchaser. Counsel said that once there is an enforceable contract, there is a beneficial interest in favour of the purchaser. Counsel referred to the Federal Court's decision *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145; [1974] 1 LNS 51 where the court found that a relationship of trustee and beneficiary would even arise from a mining sublease or a mining licence.

**[167]** According to counsel, the judge was therefore wrong in asking the sole question of whether the plaintiff had paid the balance purchase price. The point in time to test whether the plaintiff had a beneficial interest in the land was the date the SPBA was executed, on 2 October 2006, not when the MAA charges were discharged. In any event, the plaintiff had made payment of RM8.8m for the land. It was contended that, the evidence clearly demonstrated that the D1, acting in concert with Sharma, intended to defeat the plaintiff's prior interest in the land. Counsel illustrated this by referring to the supplementary terms to the joint venture agreement dated 21 June 2007, where cl 7 stated that:

> 7. *The Landowner [ie Sharma] shall take all relevant actions*, and cause the borrower, Trident Hill Sdn Bhd to take all relevant actions, *including commencing* and defending *any legal suit against*/by any party, any legal suit and foreclosure proceedings by Malaysian Assurance Alliance Berhad and/or *IB Capital Sdn Bhd until the Developer [ie D1] can successfully obtain financing from a bank* ... (Emphasis added.)

**[168]** Three weeks after signing the supplementary terms with D1 on 21 June 2007, Sharma then launched an action against the plaintiff on 13 July 2007 via Suit 775 which resulted in the consent judgment dated 21 August 2008, para 3 of which reads as follows:

> 3. That the Plaintiff [ie Sharma] *agrees to relinquish all his rights, interest and benefits over the Property* [ie the Land] in favour of the First Defendant [ie IB Capital, the

plaintiff herein] and/or the First Defendant's nominees at the expiry of the Settlement Period [ie from 1.9.2008]. (Emphasis added.)

**[169]** Counsel said that D1 and Sharma were acting in concert to defeat the plaintiff's prior interest and they concealed the true situation from the plaintiff. He said, the reality was that events were happening behind the plaintiff's back and they were having their 'grave dug by D1 and Sharma'. Counsel demonstrated this by referring to the letter dated 4 April 2008 which was sent by D1's solicitors to Sharma's solicitors and which read as:

*Your client [ie Sharma] also assured our client [D1] that he could deal with IB Capital* and that *he could easily instruct his solicitors to 'drag' the legal proceedings with IB Capital for years* and challenge IB Capital's claims by raising numerous objections. He said that *he had already instructed his solicitors to remove IB Capital's caveats on the Land by raising numerous technical objections*. (Emphasis added.)

**[170]** When cross-examined by plaintiff's counsel on this letter, D1's witness (DW1) admitted that D1 knew of the plaintiff's interest in the land. DW1 also admitted under cross-examination that D1 could have apprised itself of the full facts of the plaintiff's interest as D1 was keeping track of Suit 775. DW1 agreed that D1 could have easily obtained a copy of the consent judgment which was entered into between Sharma and the plaintiff simply by conducting a file search. However, D1 did not do so. DW1 agreed that D1's solicitors should have asked for a copy of the contractual documents between Sharma and the plaintiff. He said that was part of the procedure.

**[171]** The plaintiff's counsel, Mr YC Wong, also put it to DW1 (Lee Chin Aik) that DW1 had no personal knowledge of the matters and that D1's CEO, Dato' Low, was in a better position to testify on D1's behalf. This was also taken up in submissions by the plaintiff's counsel.

**[172]** Counsel said that similarly, D2 had knowledge of the plaintiff's prior interest in the land. Reference was made to the letter of offer dated 17 July 2012. When cross-examined by plaintiff's counsel on the letter of offer dated 17 July 2012, DW2, who was the bank's team manager who signed the supplementary letter of offer dated 5 August 2013, admitted that he was fully aware that part of the proceeds of the loan to D1 was to be used to settle the plaintiff's claim over the land. According to counsel, just like D1, D2 did not bother making any enquiries into the plaintiff's prior interest in the land. D2's unusually lax approach was in fact noted by the learned judge at the trial. The judge observed that as D2 was giving a colossal loan to D1, they ought to have done a microscopic examination of all the documents, including the various agreements and court orders.

**[173]** During the trial, the judge said:

Judge: I would have thought normally bank to give 1K loan also they will study everything you know, what more 50 million and 76 million you know kan? It is not, they are not giving loans with closing 2 eyes you know kan.

PC: Yes, yes.

Judge: They are using microscopic equipment you know.

PC: Precisely.

Judge: Kan? To examine all documents correct or not, you are able to pay back you know, the land is free from encumbrances ... etc ... etc ... you know. Microscopic examination on documents kan?

**[174]** Despite the judge's observation as above, there was no mention in the grounds of judgment about D2's abject failure to conduct a 'microscopic' (or any) examination of the relevant documents. Counsel said that D2's disavowal of the plaintiff's interest over the land was because D2 was suffering from 'post-action amnesia'. He said that D2 had actual knowledge of an interest and this encompasses constructive knowledge of the extent and the nature of the interest.

**[175]** He referred to the case of *Barnhart v Greenshields* [1853] 9 Moo PCC at p 209 where the Privy Council (on appeal from Canada: a jurisdiction which also used the Torrens system) said:

> With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to the interests connected with his tenancy, as in *Taylor v Stibbert* (2 Ves jun 437), but also to interests under collateral agreements, as in *Daniels v Davison* (16 Ves 249), *Allen v Anthony* (1 Mer 282), *the principle being the same in both classes of cases; namely, that the possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact, is bound, according to the ordinary rule, either to inquire what that interest is, or to give effect to it, whatever it may be*. (Emphasis added.)

**[176]** On the facts of *Barnhart*, the Privy Council was dealing with an unregistered interest, which is the same as the case before us. According to counsel, D1 and D2, having knowledge of the plaintiff's prior interest in the land, ought to have taken steps to enquire into it. This, they did not do. Hence, they are bound by the full extent of plaintiff's prior interest in the land, as actual knowledge of a fact includes constructive or implied knowledge of a fact. (see: *Snell's Equity* (34th Ed) at p 71)

**[177]** Since the defendants had knowledge of the plaintiff's prior interest, the defendants held and now hold the title over the land as constructive trustees for the plaintiff. Counsel referred to the Privy Council's decision in *Loke Yew v Port Swettenham Rubber Company Limited* [1913] AC 491 at p 505.

**[178]** Hence, it was argued that the defendants are not bona fide purchasers in good faith for value of the land. The defendants having knowledge of the plaintiff's prior interest, held the land on a constructive trust in favour of the plaintiff. As a result, the plaintiff is entitled to the land as well as its proceeds (see: *Foskett v McKeown and others* [2000] 3 All ER 97). In that case, Lord Millet said (p 120):

> A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a bona fide purchaser for value without notice.

**[179]** Counsel said that none of the plaintiff's submissions on these points in the court below were given any consideration by the judge in her grounds of judgment. As such, it was submitted that a reasonable tribunal armed with the facts above would conclude that the defendants conduct was unconscionable.

**[180]** According to counsel, the question is whether the judge was correct in saying a constructive trust was not established. The judge concluded the plaintiff had failed to establish an interest in the land. He said that this is a serious misdirection. Counsel said that in Malaysian jurisprudence, a constructive trust is not only of the institutional form but is also remedial. He said that Malaysian law recognised both the institutional and remedial constructive trust. Counsel referred to *Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* [2017] MLJU 1107; [2017] 8 CLJ 392.

**[181]** On the issue of bare trust/constructive trust, counsel said that a trust relationship came into existence the moment the SPBA was executed.

**[182]** He said upon execution of the contract for the sale of the land, beneficial ownership passed to the plaintiff and Sharma having only a right to the balance of the purchase price. Counsel placed considerate reliance on Justice Peh Swee Chin's judgment in *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614; [1994] 3 CLJ 20; [1994] 2 AMR 1445 ('Yeong Ah Chee') which was approved by the Federal Court in *He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal* [2020] 4 MLJ 662; [2020] 7 CLJ 71 ('He-Con'). Counsel also referred to *Ong Chat Pang*'s and drew a parallel with that case.

**[183]** Further, he said that it was not necessary for common law fraud to be established to show a case on constructive trust. In *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 2 AMR 609; [2010] 1 CLJ 381 (FC) ('Takako Sakao') the Federal Court made it clear that inequitable conduct is sufficient. Here, the plaintiff relied on the equitable misconduct by D1 and D2.

**[184]** According to counsel, at the very least, the plaintiff was an equitable mortgagee or chargee, as the plaintiff had advanced money on the land on the faith that the plaintiff will acquire the land once full payment have been made. The remedial constructive trust will thus operate in this case, see: *RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal* [2016] 1 MLJ 175; [2015] 1 CLJ 309 (FC).

**[185]** Counsel for the plaintiff said that there is no provision in the National Land Code which prohibits the creation of equitable charges or liens. That is a correct statement of the law.

**[186]** Thus, although the plaintiff did not have a registered interest, that did not preclude the coming into existence of an equitable interest — the equitable charge. In *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266; [1984] 1 CLJ Rep 230; [1984] 1 CLJ 286 (FC) (at p 270) the Federal Court (per Salleh Abas CJ Malaya) opined that:

> Examination of courts' decisions clearly show that the courts have resorted to equitable principles and consistently held that *an agreement or an arrangement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge* giving rise to an equitable right in favour of the creditor, although no charge or lien within the provisions of the National Land Code or the previous Code is executed or created. (Emphasis added.)

**[187]** In amplification, counsel said that the SPBA was in the nature of an equitable security transaction wherein the right to redeem remained irrespective of whether the duration for redemption had expired. He cited the case of *Yaacob bin Lebai Jusoh v Hamisah binti Saad* [1950] 1 MLJ 255 at p 257; [1950] 1 MLR 210; [1950] 1 LNS 100 (CA) and *Nawab Din v Mohamed Shariff & Ors and Mohamed Shariff & Ors v Nawab Din* [1953] 1 MLJ 12b at p 14; [1952] 1 LNS 64 (HC).

**[188]** Before us, counsel for the plaintiff complained that the judge did not address her mind at all on these issues. Therefore, her judgment is flawed. As far as D1 is concerned, it was aware of the existence of the plaintiff's interest, and therefore D1 had implied constructive knowledge of the extent of that interest. D1 and Sharma schemed to delay the plaintiff and to lure the plaintiff into a state of confidence while D1 was pursuing its course of action to get financing from D2.

**[189]** He said, there was no laches on the totality of the evidence. Laches is an equitable defence, and to maintain it and obtain relief a defendant must have an equity which on balance outweighs the plaintiff's right, see: *Nwakobi (Osha of Obosi) v Nzekwu* [1964] 1 WLR 1019 at p 1026.

**[190]** The judge gave undue weight to the alleged delay on the part of the plaintiff in acting against Sharma. Since D1 held and holds the title over the land as a constructive trustee for the plaintiff, the plaintiff is entitled to rely on both limbs of s 22 of the Limitation Act on the trust ground and thereby to defeat any plea of limitation (see: *Koh Siew Keng (P) & Anor v Koh Heng Jin* [2008] 3 MLJ 822; [2008] 3 CLJ 450 (CA) (at paras 23–25)).

**[191]** Furthermore, under s 29(b) of the Limitation Act, the period of limitation will not begin to run if the plaintiff's right of action is concealed by fraud, until the plaintiff had discovered the fraud or could with reasonable diligence have discovered it (see: *Lim Yoke Kong v Sivapiran a/l Sabapathy* [1992] 2 MLJ 571; [1992] 4 CLJ 2219; [1992] 1 AMR 269 (SC) at pp 577 and 581–582).

**[192]** In sum, counsel argued that it is not the fact that there was a SPBA, but the fact that *the plaintiff invested money in the land and the beneficial interest in the land vested in the plaintiff upon the execution of the SPBA*. Counsel said that the defendants' conscience was bound and there is a constructive trust of the plaintiff's interest. The question of how to satisfy this interest is a question of the type of remedy to be given by the court.

**[193]** In this regard, the court has a considerable discretion to tailor the award to fit the circumstances of the case, see: *Schnogl v BB* [2005] BCJ No 2712 at para 21. The defendants were acquirers of property, not interlopers. They are not third parties who interfered with the interest in the property, but they acquired the trust property with the knowledge of the trust in favour of the plaintiff. Thus, their consciences were bound.

**[194]** Consequently, it was contended that D1's title to the land and D2's charge was liable to be set aside under s 340(4)(b) of the National Land Code. Counsel relied on the following passage from the case of *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94; [1997] 1 CLJ 636; [1997] 1 AMR 997 (FC) where the Federal Court said (p 100 MLJ):

> In our judgment, Parliament enacted s 340(4)(b) for the purpose of dealing with fact patterns that do not fall squarely within the other exceptions to indefeasibility that appear in the second subsection to s 340 of the Code. While recognizing that it is neither possible, nor desirable to predict with any degree of certainty the wide range of cases that, while failing to come within the vitiating categories specified by the second subsection, may yet come within the scope of s 340(4)(b), we cite, by way of illustration only, cases decided under the Moneylenders Act 1951.

**[195]** We turn now to the submission that were made on behalf of D1. Counsel for D1 said that whatever equities which the plaintiff had was extinguished because they did not take any active steps to redeem the MAA

charges and did not take steps to enforce the SPBA. Counsel said that unlike the plaintiff, D1 had taken various steps to remove multiple caveats, obtained specific performance orders from the High Court in Penang (via Suit 240).

**[196]** He said that the most important issue is that the redemption sum of RM46.15m was paid to MAA and D1 is still servicing the loan at RM300,000 per month. He said that the plaintiff is entitled to pursue the return of RM8.8m from Sharma. He argued that the plaintiff had a choice to redeem the land from MAA, but they did not do so. They sat on their rights.

**[197]** As for the consent order between the plaintiff and Sharma, he said that it had nothing to do with D1 and that it was between the plaintiff and Sharma. Under the consent order, Sharma was supposed to redeem the land. He emphasised that the plaintiff was a moneylender and that they used the consent order to recover the loan. They are not bona fide. They should have redeemed the land, but they did not do so. Counsel referred to PW2's evidence where he agreed that the MAA charges were not redeemed. Counsel said that in as much as the plaintiff was seeking equitable relief, equity will not aid the indolent. From 2006–2013 nothing was done by the plaintiff. In this regard, the plaintiff had not acted with vigilance.

**[198]** In particular, the plaintiff's former solicitors were lackadaisical. He said that there was no plot between D1 and Sharma. D1 had paid valuable consideration to purchase the land. He pointed out that the plaintiff had no intention of completing the sale. He said that the SPBA did not give rise to a legal mortgage or even an equitable mortgage. He said that the agreements between the plaintiff and Sharma were a *scam*.

**[199]** In any event, he said that the plaintiff is to be blamed as they had not paid the full purchase price. Counsel for D1 relied on the Federal Court's decision in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 AMR 1537; [1996] 2 CLJ 561 (FC), where Edgar Joseph Jr at p 29 (MLJ) said:

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

**[200]** Next, we refer to the submissions that were made on behalf of D2.

**[201]** Essentially, D2's stand was that they (as the registered chargee) have an indefeasible legal charge (s 340 of the National Land Code ) as they are bona

fide purchasers for value without notice of the plaintiff's interest. Counsel for D2 made a frontal attack on the plaintiff's claim to an interest in the land. She said that the underlying basis of the plaintiff's case which rested on its pleaded case and the evidence given by the plaintiff's witnesses, namely PW1 and PW2, was premised on:

(a) the alleged loan of the RM8.8m granted by the plaintiff to Sharma;

(b) the sale and buy back agreement dated 2 October 2006;

(c) the powers of attorney given by Sharma; and

(d) the consent judgment dated 21 August 2008 which was recorded in Suit 775.

**[202]** It was submitted for D2 that none of these confer the plaintiff with legal or equitable interest in the land. Counsel for D2 said that the loan RM8.8m was not proven as the evidence relating to the existence of the purported 'loan' arrangement was never produced by the plaintiff despite D2's challenge to the plaintiff's witnesses. Thus, the question of Sharma's 'pledge' of the land as 'security' does not arise. Counsel said that Sharma, the central figure in the plaintiff's entire claim was not produced and there appeared to be no attempt by the plaintiff to have him testify in the trial. Counsel said that the absence of the purported loan agreement to Sharma and the testimony of the lawyers who purportedly acted for the plaintiff demonstrated the inability of the plaintiff to prove its claim. On the SPBA, counsel for D2 said that the veracity of this document is highly in doubt as Sharma was not produced as a witness. She said that the plaintiff's reliance on the SPBA, to establish its interest in the land, is completely misconceived and without any merit. She said that the clauses in the SPBA did not create an interest in the land. It was submitted that there can be no interest in the land if the full purchase price has not been paid. The plaintiff's witnesses confirmed that RM50m (purchase price) was not paid for the land. Hence, it was submitted that the judge was correct to find that no interest in the land can be conferred on the plaintiff unless the full purchase price had been paid, and the MAA charges were redeemed.

**[203]** Next, as for the plaintiff's allegation that Sharma had transferred all his beneficial interest in the land to the plaintiff by way of a consent judgment dated 21 August 2008, counsel for D2 said that it provides for a monetary claim of RM10,256,098.66 to be paid by Sharma (para 1 thereof) and there was an arrangement for Sharma to dispose of the land (paras 5–6).

**[204]** The consent judgment also provided for Sharma to settle MAA's charges (para 2). Counsel said that as it stood, the consent judgment did not confer the plaintiff with any legal or beneficial right to the land.

**[205]** Counsel emphasized that on 6 August 2007, Sharma sold the land to D1 pursuant to the D1 SPA and this was even before the consent judgment of 21 August 2008. Counsel for D2 said that the consent judgment was not made known to D1 and D2 at the material time. Counsel also argued that when the consent judgment was entered on 21 August 2008, Sharma had already sold the land to D1 pursuant to the D1 SPA and at that time the land was already legally charged to MAA. It was submitted that the plaintiff cannot have a better interest to the land than Sharma.

**[206]** As in any agreement, the plaintiff only has the right to pursue Sharma for his breach of whatever agreement between them, or to enforce the consent judgment against Sharma. The plaintiff never did either of this. The consent judgment itself cannot confer rights to the land to the plaintiff.

**[207]** Next, it was contended that D1 had obtained two orders of specific performance in the Suit 240 which are dated 19 September 2011 and 2 May 2013. These orders were for the purpose of compelling the transfer of the land to D1. The plaintiff, however, only refers to the Order dated 19 September 2011 obtained by D1. According to counsel for D2, the following has to be noted:

(a) subsequent to the order dated 19 September 2011 the plaintiff's caveats had lapsed, on 17 July 2012 and 29 November 2012 respectively. In any event, they were also removed by the High Court via court order dated 22 January 2013 in OS 2106 with no appeal therefrom;

(b) the order of 2 May 2013 in Suit 240, which varied the order dated 19 September 2011, was obtained after the private caveats lapsed/were ordered to be removed. The order dated 2 May 2013, inter alia, provided for:

(i) the High Court Registrar, the Insolvency Office and the land Office to give effect to the transfer of the land from Sharma to D1, as Sharma had not complied with the order of 19 September 2011; and

(ii) a redemption statement to be procured from only MAA, as legal chargee, so as to enable the transfer of the land.

**[208]** Counsel for D2 said that as the plaintiff's caveats (as well as the other third party caveats) had been removed/had expired, there was no longer any issue of paying any redemption sum to the plaintiff to procure the removal of the plaintiff's caveats. This was apparently why the order dated 2 May 2013 only referred to a redemption of the MAA charges.

**[209]** The order dated 2 May 2013 has not been set aside and the DGI (representing Sharma's estate in bankruptcy) had agreed to the same. Pursuant to the Order 2 May 2013, the MAA charges were redeemed by the bank (using RM40m from the facilities granted to D1). The balance redemption sum of RM6.15m was settled by D1.

**[210]** There was nothing amiss at all with the actions taken by D1 and D2. The plaintiff has not shown how D1 and D2 had violated the terms of the orders dated 19 September 2011 and 2 May 2013.

**[211]** As for the plaintiff's contention that D2 knew or ought to have known of the plaintiff's purported interest in the land at the time of the creation of the legal charge, on the basis that D2 knew of the agreement dated 30 January 2008 entered between Sharma and D1 and D2's first letter of offer dated 17 July 2012 (*which appeared to recognize the plaintiff's interest in the land*), counsel said that the plaintiff was attempting to rely on one cl 1.6 which was *buried* within the agreement dated 30 January 2008, which required Sharma to furnish to D1 the redemption statements from MAA and the plaintiff.

**[212]** Counsel for D2 said that DW2 who was D2's credit officer who processed the financing application for D1 in respect of the land, confirmed under oath that:

(a) D2 did not have any knowledge of the plaintiff's alleged interest in the land prior to the creation of the legal charge and D2 itself had never seen the agreement dated 30 January 2008 (between D1 and Sharma);

(b) DW2 confirmed that he never saw the agreement dated 30 January 2008 and it was not given to him when he approved D1's financing;

(c) DW2 confirmed that after the action by the plaintiff was filed and the plaintiff's allegation was made, he went back to check whether D2 has the agreement dated 30 January 2008, and he confirmed that D2 did not have such an agreement in its possession; and

(d) all that D2 knew was that the plaintiff had lodged the caveats over the land, and that D1 had successfully removed the same and that there was no appeal against such order for removal of the private caveats. D2 also knew the plaintiff's private caveats had expired in any event.

**[213]** Thus, the plaintiff has not proven D2 was put on notice that the plaintiff had any alleged interest in the land. The plaintiff's allegation that D2's witness had committed perjury is completely baseless.

**[214]** Counsel for D2 said that the judge had seen the demeanour of the witnesses and had made her findings of fact. Counsel for D2 referred to DW2's

A evidence to the effect D2 had relied on the legal advice obtained on 5 August 2013 from its documentation solicitors, ZICO prior to the release of the financing.

B **[215]** Thus, when D2 released the financing to D1, for the discharge of MAA's Charges, and thereafter obtained the legal charge over the land, there was nothing to indicate to D2 that the plaintiff had at the material time an existing interest in the land. D2 also never had any dealing or relationship with the plaintiff with regard to the land. In the upshot, counsel for D2 said that D2's legal charge is indefeasible under s 340 of the NLC.

C

**[216]** The plaintiff has not shown any exception to defeat such indefeasibility and/or that D2 was not bona fide. Even if the transfer of the land to D1 was somehow unlawful (which is denied), the law is settled that D2 is entitled to rely on the proviso to s 340(3) of the NLC, where D2 as a chargee had acquired its interest as a purchaser in good faith and for valuable consideration. Thus, the legal charge cannot be defeated.

D

**[217]** Counsel said that the evidence clearly shows that:

E (a) when D2 granted the loan to D1, there were no encumbrances or caveats on the land except for the MAA's charges; and

(b) D2 is a bona fide purchaser for valuable consideration, as it had made payment of RM40m to MAA and there was nothing to show, at the material time D2's charge was obtained, that the plaintiff had any interest in the land.

F

**[218]** As for the plaintiff's complaint that D2 is a constructive trustee of the land and is liable to restore the same to the plaintiff, it was argued that the plaintiff must first establish that the land is held on trust for it, before it can assert that D2 is a constructive trustee for it.

G

**[219]** Counsel said that neither D1 nor D2 were the trustees of the land, constructive or otherwise for the plaintiff. As for indolence/delay on the part of the plaintiff, counsel said that the judge was correct in taking into consideration, the plaintiff's delay, and inaction. The plaintiff had been indolent since 2007. The plaintiff only decided to file the action herein on 29 January 2014 for the land.

H

I **[220]** The plaintiff realised that Sharma has been adjudged a bankrupt on 7 May 2010. They realised that Sharma would be in no position to pay any money to the plaintiff (if indeed there was any debt owed to the plaintiff) and saw the opportunity of staking a claim on the land which PW2 valued at above RM100m. The plaintiff knew that the MAA charges had already been settled

by D1 and D2. The plaintiff's action is not bona fide and the plaintiff was unable to explain why it waited several years before enforcing its alleged right to the land.

OUR DECISION

**[221]** In our view, the appeal is broadly framed by the following issues:

(a) plaintiff's interest over the land;

(b) defendants' knowledge;

(c) conduct of the defendants;

(d) whether the defendants were constructive trustees?

(e) whether the defendants were bona fide purchasers? and

(f) whether the plaintiff's conduct was such that they lost their prior interest, or became disentitled to equitable reliefs?

PLAINTIFF'S INTEREST OVER THE LAND

**[222]** It is not in dispute that the plaintiff did not pay the balance of the purchase price under the SPBA and more fundamentally, did not pay the redemption sum to MAA so that the MAA charges could be discharged. However, the fact remains that the plaintiff did give a loan of RM8.8m to Sharma. But D2 disbelieved that there was ever such a loan.

**[223]** They tried to demolish the plaintiff's basic premise for the entry of the caveats. They said the plaintiff had failed to prove the existence of a loan. We have checked the records and it does not appear that D2 sought any discovery of documents from the plaintiff concerning the loan of RM8.8m.

**[224]** As we said in the earlier part of this judgment, the judge did not make any adverse ruling as to the existence of the loan to Sharma. The judge appears to have implicitly accepted that there was such a loan. In our view, rightly so.

**[225]** It is important to recall that all along, D1 never once questioned the authenticity of the loan by the plaintiff to Sharma. D1's contemporaneous conduct demonstrated that they believed that there was a loan. In fact, D1 went beyond just believing that there was a loan. D1 implicitly accepted that the plaintiff was an equitable chargee who had a right to commence foreclosure proceedings. D1's fear of foreclosure proceedings was no figment of imagination.

A **[226]** Indeed, D1 had spoken to Sharma about this and the latter had assured D1 that his lawyers could 'drag out' any legal proceedings in the event the plaintiff mounted any claim vis a vis the land (see: letter dated 4 April 2008 from Messrs Ong & Manecksha to Sharma's solicitors). Indeed, even D2 had (implicitly) accepted that the plaintiff had some rights over the land and had
B indicated in their letter of offer dated 17 July 2012 that part of the loan proceeds was to be used to pay the plaintiff so that the plaintiff's caveats could be cancelled. At various occasions, the plaintiff had given redemption statements to D1, which were not disputed at the material time.

C **[227]** But DW1 said that D1 did not know the basis for the plaintiff's computation of the amount that was outstanding pursuant to the loan that was given to Sharma. Of course, it is correct to say that ordinarily, the plaintiff would have only rights *in personam* against the borrower, Sharma. The loan
D would not have given rise to any caveatable interest.

**[228]** But the SPBA had changed the position of the plaintiff from being a mere lender of a loan, to a party with rights to the land in the manner as specified in the SPBA.

E **[229]** Counsel for the plaintiff first claimed that the plaintiff was entitled to the land and that the title in the name of D1 and the charge in favour of D2, should both be cancelled. He said that since PW2 had conceded during cross-examination that the plaintiff had not paid the redemption sum to MAA
F and had offered to pay the requisite amount if so, ordered by the court, the plaintiff cannot take the land for free. He was prepared to accept a remedy such that the plaintiff would have to reimburse D2 for the amount that was paid to MAA. In the alternative, he said that the plaintiff was *at least an equitable*
G *chargee*.

**[230]** For the reasons as will be elaborated in greater detail in the later part of this judgment, we will state quite categorically and unreservedly that the plaintiff was for all intents and purposes, an equitable chargee.

H **[231]** Indeed, the defendants had in fact treated or regarded the plaintiff as such. Thus, the conclusion which we have reached in this regard is merely a logical affirmation of the position that obtained at all material times prior to 5 September 2013. Having thus determined the plaintiff's interest over the land,
I we may now deal with the issue of the defendants' *knowledge of the plaintiff's interest*.

DEFENDANTS' KNOWLEDGE OF THE PLAINTIFF'S INTEREST

**[232]** We shall start by alluding to the legal principles concerning 'knowledge'. The issue of knowledge is the proverbial key to unlocking the vexed issues in this case. It would be useful therefore to examine the legal principles in relation to the issue of 'knowledge'.

**[233]** We will start with the case of *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 which is of considerable utility for our purposes. At pp 575–576 of the case, Peter Gibson J dealt with the question of proof of knowledge and said:

> Knowledge may be proved affirmatively or inferred from circumstances. The various mental states which may be involved are (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry. A person in categories (ii) or (iii) will be taken to have actual knowledge, while a person in categories (iv) or (v) has constructive notice only.

**[234]** Thus, a person either had 'actual knowledge' or 'constructive knowledge'. Both types of knowledge are potent. It all depends on whether the party who claims to be a bona fide purchaser had actual knowledge or constructive knowledge of a pre-existing interest over the subject matter of the trust. The question that arises sometimes is whether 'wilful blindness' or 'turning a blind eye', or the proverbial 'Nelsonian eye' can be exalted to actual knowledge. In this regard, the authors of *Snell's Equity* (34th Ed) opined, inter alia, that 'wilful blindness' could be equivalent to actual knowledge. At para 4.028 (p 71) the authors of *Snell's Equity* said:

> The Bona Fide Purchaser For Value Without Notice
>
> (a) Actual notice. It has been said that actual notice should only be binding if it was given by a person interested in the property and in the course of the negotiations, and if it was clear and distinct, and that vague reports from persons not interested in the property would not affect the purchaser's conscience. The better view may be, however, that a purchaser could not safely disregard information from any source if a reasonable person would have acted on it. *Wilful blindness about the existence of the equitable interest would be equivalent to actual knowledge of it.*
>
> Where a purchaser with actual notice of an equitable charge completed his purchase on the faith of a forged discharge, he was held to be subject to the charge; since he chose to complete in reliance upon the assurance of the vendor or of the vendor's solicitor that an equitable interest had been got in or destroyed, he did so at his own risk.

ACTUAL KNOWLEDGE

**[235]** We may now consider actual knowledge. The classic example of actual notice/knowledge is seen in the case of *Loke Yew v Port Swettenham Rubber Company Limited* [1913] AC 491 (PC). The appellant in the appeal before the Judicial Committee of the Privy Council was Loke Yew. He was the defendant in the suit, which was commenced by the Port Swettenham Rubber Company, Ltd, the respondent (plaintiff). The plaintiff purchased 322 (except Loke Yew's 58 acres) acres of land in Selangor from the registered owner Mohamed Eusope ('Eusope'). However, the conveyance document was for the transfer of the entire parcel (including the 58 acres). The plaintiff's agent who handled the deal was Mr. Glass. He was aware of Loke Yew's interest in the 58 acres. Eusope had parted with possession of the 58 acres and was collecting an annual fee from Loke Yew. Eusope declined to execute the conveyance. In order to convince Eusope to sign the conveyance, Glass expressly represented to Eusope that they would buy over Loke Yew's interest. The respondent was aware that Loke Yew was in possession 58 acres under unregistered Malay documents constituting him the owner subject to the payment of an annual rent to Eusope. The respondents, with actual knowledge of Loke Yew's interest, bought from Eusope the 322 acres, except the 58 acres.

**[236]** A transfer of the whole 322 acres was prepared, and to induce Eusope to sign it, the respondents' agent (Mr. Glass) told him that if he did so, the respondents would purchase the appellant's interest, and signed a document which stated, '*As regards Loke Yew's interest I shall have to make my own arrangements*.' Eusope thereupon signed the transfer. The respondents, having obtained thereunder registration of the entire 322 acres, called upon the appellant to give up possession of the 58 acres, and upon his failing to do so commenced an action, claiming possession thereof and damages. The appellant by his defence claimed title to occupy the land in dispute by virtue of the Malay documents and pleaded that the respondents had taken their transfer with full knowledge of the appellant's title and rights and that their conduct amounted to fraud within the Registration of Titles Regulation, 1891, s.7. The plaintiff's suit was dismissed, and judgment was entered in favour of Loke Yew. The plaintiff's appealed to the Court of Appeal. The Court of Appeal ruled in favour of the plaintiff. The Privy Council allowed Loke Yew's appeal and restored the judgment of the judicial commissioner. At pp 506–507, Lord Moulton dealt with the issue of the respondent's *actual knowledge of Loke Yew's interest* in the land and said:

> There is, however, another ground upon which, in their Lordships' opinion, the defendant is entitled to succeed in this case. It is admitted that *the plaintiff company bought with full knowledge of the transactions with regard to the land occupied by Loke Yew, so that they knew that Haji Mohamed Eusope had parted with his rights in that land.*

Under the provisions of s 3 of Enactment No 9 of 1903, entitled 'An Enactment to define and amend the Law relating to certain kinds of Specific Relief,' the plaintiff company became by the transfer trustees for Loke Yew in respect of that land. This is clear from Illustration (g) to that section, which reads as follows:

'A. buys certain land with notice that B. has already contracted to buy it. A. is a trustee within the meaning of this enactment for B. of the land so bought.'

The present is an even stronger case, inasmuch as the plaintiff company through Glass, their trustee and agent in the transaction, were aware that Haji Mohamed Eusope had actually granted away these lands and been paid for them. *The plaintiff company, therefore, are trustees for the defendant for all the rights of which they thus had notice.* These rights amounted to the rights of a freeholder subject to an annual payment to the owner of the head grant.

Now, it is clear that a cestui que trust has the right to require a trustee who is a bare trustee for him of land to register that land in his name, seeing that he is the sole beneficial owner and that the trustee has no interest therein. The present action from this point of view is an action by a bare trustee of land to eject the beneficial owner who is and has for years been in possession of the land and is cultivating it.

## CONSTRUCTIVE (NOTICE) KNOWLEDGE

**[237]** Next, we must consider the issue of constructive notice or constructive knowledge. This is sometimes described as knowledge that the person ought to have been aware of, or had the means of knowing. It is knowledge which the law will impute. But this will depend on the circumstances of the particular case and it depends on several factors. But the primary question is whether the other party had acted in a reasonably prudent manner. In this regard, we would regard the following passage from *Snell's Equity* at para 4.029 (p 71), as accurately reflecting the legal position. It reads:

(b) Constructive notice.

(1) The principle. The general principle was that a purchaser had constructive notice of all that a reasonably prudent purchaser, acting on skilled advice, would have discovered. Constructive notice has been said to be:

> in its nature no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted.

There were two main heads of constructive notice, namely:

(i) Those where the purchaser had actual notice that the property was in some way incumbered. Here he had constructive notice of all that he would have discovered if he had investigated the incumbrance.

(ii) Those where the purchaser, whether deliberately 105 or carelessly, abstained from making inquiries that a prudent purchaser would have made.

**[238]** Next, it is also necessary to have regard to the lucid exposition of the law

on constructive notice by Justice PN Bhagwati (later Chief Justice) in *Haji Abdul Gafur Haji Hussenbhai v The Ahmedabad Municipal Corporation* (1967) 8 GLR 65 where he said (pp 65–66):

> *Constructive notice is the equity which treats a person who ought to have known a fact as if he actually does know it.* It arises from an irrebuttable presumption of notice. The test to be applied is what is the course which on the facts and circumstances of the case an ordinarily prudent purchaser dealing bona fide in the proper and usual manner for the protection of his own interest would have followed 'with a view to his own title': what inquiry he would have made? If the purchaser omits to follow such course or to make such inquiry he must be held to be guilty of wilful abstention from making such inquiry with the intention of avoiding knowledge of facts which such inquiry would reveal or of gross negligence and in such a case he must be fixed with constructive notice of facts which he would have known if he had made such inquiry. It may be that in a given care having regard to the facts and circumstances an ordinarily prudent purchaser may not be expected to make a particular inquiry or to follow a particular course and in such a case omission to follow such course or make such inquiry would not be visited with constructive notice of facts which might have come to the knowledge of the purchaser if he had not so omitted.

**[239]** The learned judge then articulated that there was a duty on the part of a party who asserts that he is a bona fide purchaser to conduct *reasonable inquiries*.

**[240]** He said (pp 76–77):

> These observations show that the test to be applied is what is the course which on the facts and circumstances of the case an ordinarily prudent purchaser dealing bona fide in the proper and usual manner for the protection of his own interest would have followed 'with a view to his own title'; what inquiry he would have made? *If the purchaser omits to follow such course or to make such inquiry he must be held to be guilty of wilful abstention from making inquiry with the intention of avoiding knowledge of facts which such inquiry would reveal or of gross negligence and in such a case he must be fixed with constructive notice of facts which he would have known if he had made such inquiry*. The proposition involved in this test is essentially a proposition of fact and not of law and it must depend on the facts and circumstances of each case whether the purchaser has omitted to follow a course or to make a inquiry which as an ordinarily prudent man dealing in the usual course of business be would have followed or made for the protection of his own interest with view to his own title.
>
> It may be that in a given case having regard to the facts and circumstances on ordinarily prudent purchaser may not be expected to make a particular inquiry or to follow a particular course and in such an event omission to follow such course or make such inquiry would not be visited with constructive notice of facts which might have come to the knowledge of the purchaser if he had not so omitted. *We must, therefore, examine the facts and circumstances of each case with reference to the standard of care and caution which should be expected from an ordinarily prudent man acting bona fide in the proper and usual manner for the protection of his own interest in the matter of purchase of property*.

**[241]** Quite obviously, the standard of enquiry or the conduct that is expected of a bona fide purchaser must fall within the band of inquiry or conduct which one would expect from a reasonable man. What then is the standard of the reasonable man? Justice Bhagwati explained (p 77) with usual clarity and lucidity that:

> The standard of care of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly suspicious and distrust every statement made by the person with whom they are dealing. Others more trusting rely implicitly on the good sense of the person with whom they are transacting business and fail to take even the elementary precautions of safeguarding their interests.
>
> The reasonable man is presumed to be free from both these infirmities. He is neither over-suspicious nor over-trusting but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide *what in the circumstances of a particular case the reasonable man would have done*.

**[242]** Having discussed the legal position on actual knowledge and constructive knowledge, we may now move on to discuss the concept of the constructive trust and thereafter, the remedial constructive trust. The primary question is — what exactly is a constructive trust?

## CONSTRUCTIVE TRUST

**[243]** In *Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* [2017] MLJU 1107; [2017] 8 CLJ 392 the Federal Court defined constructive trust as follows:

> [57] It is to be noted that a constructive trust is a creature of equity. By its very nature, whether or not a constructive trust arises in the absence of the consent of the State Authority to transfer the land is very much dependent on the facts of the case. As regards the present case a relevant factor to consider is whether there was any unconscionable conduct on the part of the appellant which would attract the intervention of equity.
>
> [58] From decided case authorities it has been established as a principle of law that constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually but not necessarily the legal owner) to assert his own beneficial interest in the property and deny the beneficial interest of another. (See the cases of (1) *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 2 AMR 609; [2010] 1 CLJ 381 and (2) *Vellasamy Pennusamy & Ors.v. Gurbachan Singh Bagawan Singh & Ors.* [2012] 2 CLJ 712; [2010] 5 MLJ 437 (CA)).
>
> [59] It has also been held that *a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties* (see the case of *Hassan Kadir & Ors. v.*

*Mohamed Moidu Mohamed & Anor* [2011] MLJU 1556; [2011] 5 CLJ 136 (FC)).

*A constructive trust is a remedial device that is employed to prevent unjust enrichment. It has the effect of taking the title to the property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it* (see the case of *Tay Choo Foo v Tengku Mohd Saad Tengku Mansur & Ors. And Another Appeal* [2009] 1 MLJ 289; [2009] 2 CLJ 363 (CA). (Emphasis added.)

**[244]** And in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 the Federal Court explained the concept of constructive trust as follows:

[111] It is trite law that the intention to create a trust is applicable in situation of express trusts and not in constructive trusts. Constructive trust are trusts that may be implied in the absence of any declaration/intention of a trust, where the trustee has induced another to act to their detriment they would acquire a beneficial interest in the land/property. A characteristic feature of this trust does not owe its existence to the parties' intention, but by operation of law. In *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 2 AMR 609; [2010] 1 CLJ 381, it was held that:

> A constructive trust is imposed by law irrespective of the intention of the parties. And it is imposed only in certain circumstances, e.g. where there is dishonest, unconscionable or fraudulent conduct in the acquisition of property.

What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or part thereof.

[112] *Constructive trust is viewed as a device under which equity will intervene so as to create a trust relationship between the parties in order to make a person accountable for the trust to prevent any unfairness or injustice. Equity will impose obligation on the defendant to hold the property for the benefit of another*. (Emphasis added.)

**[245]** Thus, a constructive trust could arise in a situation where the vendor of property sells it to one party and collects a deposit or part payment, and at or around the same time, proceeds to sell the same property to another party. In *Samuel Naik Siang Ting* at para [50], the Federal Court referred to *Hadley v London Bank of Scotland* (1865) 12 LT 747 in which Lord Justice Turner held as follows:

... *if there is a clear valid contract for sale the Court will not permit the vendor afterwards to transfer the legal estate to a third person*, although such third person would be affected by *lis pendens*.I think this rule well founded in principle, for the property is in equity transferred to the purchaser by the contract; the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him.

**[246]** Such a fact pattern occurred in *Ong Chat Pang*. However, in that case, Gill FJ said (at p 229) that certain conditions must be met before a person

becomes a bare trustee or constructive trustee. He said:

> In *London and South Western Railway Company v Gomm* (1882) LR 20 Ch D 562 581 Jessel MR said that 'the right to call for a conveyance of the land is an equitable interest or equitable estate'. *SK Das* on the Torrens System in Malaya says at pages 357 and 358 that subject to fulfilment of certain conditions a point is reached when the vendor becomes *a constructive or bare trustee for the purchaser by operation of law.* The conditions mentioned are (a) that there is in existence a contract sufficient in form and in substance so that there is no ground whatever for setting it aside as between the vendor and the purchaser, (b) that the purchaser has carried out all his obligations under the contract, (c) that there is in existence a title under the Code in the vendor (or in a third party who is able and willing at the instance of the vendor to complete the sale by registration), whether an undertaking is given to make out a title or not, at a date fixed for completion or, where no time is fixed, within a reasonable time from the date of the contract, and (d) that the vendor has no duties to perform other than those of executing the transfer and perfecting the purchaser's title by registration.
>
> In my judgment, the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done all that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser. In other words, a purchaser does not get a title in equity until the vendor has done all that is necessary to perfect the purchaser's title.

**[247]** As can be seen from the conclusion that was reached by the judge in the present case, which said position was fully supported by counsel for the defendants, a bare trust will arise only upon the purchaser having paid the full purchase consideration. The following passages from the decision of the Federal Court in *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016] 3 CLJ 193 are instructive on the point relating to a bare trust:

> The principle of beneficial ownership
>
> [33] We will begin with an elucidation of the principle of beneficial ownership which we think is crucial to this case. This principle of beneficial ownership was alluded to by Edgar Joseph JR in *Borneo Housing Mortgage Finance Bhd* where he observed:
>
> > ... the contractual events which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchaser, is on completion, that is to say, *upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form, in favour of the purchaser*, for it is then the vendor divest himself of his interest in the land. (Emphasis added.)
>
> [34] According to this principle, when a purchaser of a property has performed his or her contractual obligation upon the full settlement of the purchase price besides executing all the formal documents to effect the*[2016] 3 MLJ 23 at 36*registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property. The purchaser thus enjoys the benefit of being the owner

of the acquired property even though he or she has yet to become its registered owner.

[35] This is clearly demonstrated by the case of *J Raju v Kwong Yik Bank Bhd & Anor* [1994] 2 MLJ 408; [1994] 2 AMR 1220, where the Supreme Court held that:

> ... the vendor of the land is only regarded as having divested himself of the beneficial interest in his land and vested it on the purchaser at the time when the purchase money had been paid in full.
>
> (see also *M & J Frozen Food Sdn Bhd* and *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149).

[36] The principle of beneficial ownership differentiate between the rights of a purchaser of a property who has fully settled the purchase price with one who has not. This principle clothes a purchaser who has settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as the proprietor of the property.

[37] Under this principle of beneficial ownership, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right in rem over the property. The purchaser is commonly accepted as having a beneficial interest in the land on the execution of the contract and upon which specific performance may be granted by the court.

This beneficial interest is also sufficient to entitle the purchaser to enter a caveat under the NLC.

[38] On the other hand, a purchaser who has not settled the full purchase price does not enjoy such benefit. The right of such purchaser is contractual in nature and in personam. He or she does not have any beneficial interest in the property. In the event of dispute, such purchaser can only institute action against the vendor with whom he or she has contracted. In other words, such purchaser merely enjoys a contractual right or a right in personam.

[39] In short, a beneficial or equitable owner of a property stands in the same position as the legal owner in terms of enforcing proprietorship rights against the world at large. The only difference is that a beneficial owner is yet to be vested with the legal title.

**[248]** At any rate, in the present case, the plaintiff was not arguing that they are beneficial owner of the land under bare trust. Rather, the plaintiff's case is predicated on the principle that was enunciated by the Supreme Court in *Yeong Ah Chee* where Peh Swee Chin SCJ at p 624 (MLJ) said:

> It is an old and well-settled rule of equity that under a valid contract for the sale of land, *the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a lien on the land.*
>
> Please see *Lysaght v Edwards* and this case was cited with approval very often in our courts, eg by the Federal Court in *Inter-Continental Mining Co Sdn Bhd v Societe des*

*Etains de Bayas Tudjuh* and *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors*.

*When the full purchase price is paid, the vendor becomes a bare trustee, ie unqualified trustee for the purchaser.* It is also of salutary effect to remind ourselves of the fact that rules of equity apply to this country by the Civil Law Act 1956 and of the observation of Lord Russel of Killowen in *Oh Hiam & Ors v Tham Kong* that 'the Torrens system is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience'.

**[249]** Thus, consistent with the *Yeong Ah Chee* principle, the plaintiff argues that they became beneficial owners of the land since they had a contract with Sharma for the purchase of the land (the SPBA) and had paid considerable amounts to Sharma under those contracts. Further, the defendants had knowledge of these facts. The question is whether the *Yeong Ah Chee* principle is extant and applicable and whether the plaintiff derived any beneficial ownership purely on the basis of having entered into contracts (SPBA) with Sharma and having paid him RM8.8m. It was suggested by the defendants that *Yeong Ah Chee* did not state the law correctly and that the true and only legal position is that there must be full payment of the purchase price before any beneficial ownership can arise whether under a bare trust or a constructive trust. The defendants contend that nothing less would suffice to give rise to any beneficial ownership in the land. Thus, the question is whether the *Yeong Ah Chee* principle is still good law? The answer to that question is found in the Federal Court's decision in *He-Con* where the Federal Court had clearly and unmistakably clarified the position with regard to the correctness of the proposition of law that was enunciated in *Yeong Ah Chee*.

**[250]** The clarification by the Federal Court may be gathered from the following paragraphs:

[45] The next issue argued before us during submissions was the question of whether the first defendant was a bare trustee for the deceased, and hence for the plaintiffs on account of exh P3. It was argued, as could be seen in the preceding paragraphs above, that both the trial judge as well as the COA had found that full payment had been made by the deceased. P2 was clear on that regard.

[46] Learned counsel for the first defendant argued that the failure of the plaintiffs to produce any receipt evincing the said full payment made must be taken adversely against the plaintiffs. It would appear that the argument goes to the sufficiency of the evidence adduced to evince full payment having been made. We say so because the law on the creation of a bare trustee relationship between a purchaser of a property who has fully paid for it and the vendor of that property, is rather settled.

In the case of *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614; [1994] 3 CLJ 20 ('*Yeong Ah Chee*'s case') the then Supreme Court had occasion to hold, inter alia, as follows:

A

> [1] *It is an old and well settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a lien on the land. When the full purchase price is paid, the vendor becomes a bare trustee for the purchaser.*

B

[47] That statement of legal principle was made by the then apex court after it had considered the legal position on the matter, not only here but also from other jurisdictions.

...

C

[54] The apex court in the *Borneo Housing* case made a passing reference to the earlier decision of the then Supreme Court in the case of *Yeong Ah Chee*'s case. We noted that it made no adverse remark about it. Rather, it recognised the reach of the *Yeong Ah Chee* case decision by stating the following:

> And, in *Yeong Ah Chee v Lee Chong Hai*, the court went so far as to suggest that the concept of the bare trust in a vendor and purchaser situation applied under the Malaysian Torrens System by virtue of the Civil Law Act 1956.

D

[55] *We find the Yeong Ah Chee case is important for what was said by learned Justice Peh Swee Chin SCJ who wrote the apex court's judgment, when he said*:

E

> *It is an old and well-settled rule of equity that under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a lien on the land.*
>
> Please see *Lysaght v Edwards* (1876) 2 Ch D 499 and this case was cited with approval very often in our courts eg by the Federal Court in *Intercontinental Miners Sdn Bhd v Society Des Etains De Banjas Tudgu* [1974] 1 MLJ 145 and *Temenggong Securities Ltd v Registrar of Titles, Johore* [1974] 2 MLJ 45. When the full purchase price is paid, the vendor becomes a bare trustee ie unqualified trustee for the purchaser. It is also of salutary effect to remind ourselves of the fact that rules of equity apply to this country by the Civil Law Act 1956 and of the observation of Lord Russel of Killowen in *Oh Hiam v Tham Kong* [1980] 2 MLJ 159, PC that 'the Torrens System is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience.

F

G

H

[56] The essence to be derived in that short but concise paragraph is that *equitable principles can coexist with legal and statutory principles under the Torrens System.* As was alluded to earlier, *the apex court in Borneo Housing's case did not say that Yeong Ah Chee's case was wrongly decided. With respect, we agree because* Yeong Ah Chee's case was decided based on sound principle.

I

[57] Indeed, the above principle had been adopted and followed by the Federal Court in *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45; [1974] 1 LNS 175 ('*Temenggong Securities* case') which held that:

> The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the appellants are bare trustees for the appellants of the said land and it must consequently follow, as night must day,

that the vendors have no interest in the lands which can be the subject matter of a caveat.

[58] There was no reason for the *Borneo Housing* case panel of the Supreme Court to have viewed the *Yeong Ah Chee* case in any adverse light. Indeed, the learned justices in the *Borneo Housing* case only found it justified in overruling the *Ahmad bin Salleh*'s case for fairly obvious reasons.

Since the vendor who has become a bare trustee for the purchaser, he can no longer deal with the property for which the purchaser has paid in full, including utilising it as a security for a loan extended in its favour by a third party. If one were to juxtapose the evidence which had been led by the plaintiffs in this immediate appeal before us with that which was led for the plaintiff in the *Ahmad bin Salleh*'s case one would readily see why the learned justices in the *Borneo Housing* case had found that the circumstances in the *Ahmad bin Salleh*'s case had fallen far short of rendering the vendor there a bare trustee.

[59] In fact, in a relatively recent Federal Court case of *Samuel Naik*'s case it was, inter alia, in para 65 that:

> There is nothing in the NLC which expressly or by necessary implication excludes or prohibits any equitable interest in alienated land, and the court ought to give effect to ordinary commercial transactions and not to invalidate any equitable mortgage created by contracts outside any statutory provisions for registration of title under the NLC.

[60] That *Samuel Naik*'s case also decided that once the vendor had received full payment of the purchase price from the purchaser, the vendor becomes a bare trustee. And in that legal capacity, the vendor was not permitted in law to sell or transfer the land to new purchasers. Any subsequent conveyances of the same property to new purchasers would thus be void as the vendor, by then being a bare trustee, did not have the requisite capacity to enter into such agreement. It goes without saying that creating a charge over such property would be tainted by the same incapacity. In para 77, the apex court in *Samuel Naik* held that the failure on the part of the original purchaser to lodge a caveat timeously did not in any way negate or defeat its equitable right, title or interest in the property under scrutiny.

[61] On the facts of the case before it, the apex court in the *Samuel Naik*'s case had answered the question posed by stating that a registered title of a bona fide immediate purchaser for value without notice under the NLC can be defeated by a non-registered valid equitable interest of an absolute assignee under an earlier SPA in respect of the same piece of land (see para 86).

(Emphasis and underlining added.)

**[251]** Clearly, there is some confusion as to whether there can be any beneficial ownership under a constructive trust when the purchaser has not paid the full purchase price.

**[252]** We therefore take this opportunity to clear up the confusion. In our view, the seeds of the problem were in fact sown in *Ong Chat Pang,* where the

Federal Court had conflated the bare trust principle with the constructive trust principle. Before discussing *Ong Chat Pang*'s case, we must say that we have considerable difficulty in accepting the proposition that was made by counsel for D2 that an equitable claimant who claimed beneficial ownership under a constructive trust, does not derive any beneficial interest until the full purchase price has been paid. Thus, following that proposition, if full payment of purchase price is a *sine qua non* to the existence of a constructive trust, then that would mean that there is no difference between a bare trust and constructive trust.

**[253]** It is important to understand that whilst both type of trusts serve to prevent the owner of a property from dealing with it in a manner inconsistent with the equitable or beneficial ownership of the beneficiary of the trust, the provenance of the trusts are different. The bare trust comes into existence when the full purchase price has been paid and all that is left is for the conveyance of the property to the beneficiary. However, a constructive trust caters for situations where the full purchase has not been paid. The contracting parties may be at the beginning or intermediate stage of the contractual relationship. What is critical to the constructive trust concept is that once the contract is entered into, then beneficial ownership passes to the contracting counterpart, and the owners right is only to receive the purchase price or the balance. The position in this regard was quite lucidly and unequivocally stated in *Yeong Ah Chee*'s case. The Federal Court in *He-Con* has resuscitated and re-iterated the *Yeong Ah Chee* principle.

**[254]** Hence, in our view, the position which obtains before the full purchase price is paid is that a constructive trust arises upon the execution of a valid contract and upon the full purchase price being paid, a bare trust comes into existence. Since the conflation of these two types of trust took place in *Ong Chat Pang*'s case, it becomes necessary to re-examine the facts of that case. In *Ong Chat Pang*, the plaintiff *had not paid the full purchase price*. He only paid 50% of the purchase price. The owner re-sold the property to the third and fourth defendants. They were aware of the plaintiff's earlier contract with the original owner. The plaintiff was not able to get his caveat registered. The third and fourth defendants were somehow able to get the title registered in their names. Yet, the plaintiff succeeded vis a vis the third and fourth defendants who knew of the earlier contract between the plaintiff and the original owners. A careful reading of the case will reveal that the plaintiff in *Ong Chat Pang succeeded under a constructive trust*, and *not under a bare trust*. As we said, in Ong *Chat Pang*, Gill FJ seemed to have conflated the concept of bare trust with constructive trust. He said that the vendor would become a bare trustee or constructive trust only upon the happening or fulfilment of certain conditions.

**[255]** The passage in the judgment in *Ong Chat Pang*'s case (*which has rather*

*unfortunately become the source of the confusion*) reads as:

> SK Das on the Torrens System in Malaya says at pages 357 and 358 that subject to fulfilment of certain conditions a point is reached when the vendor becomes a constructive or bare trustee for the purchaser by operation of law. The conditions mentioned are (a) that there is in existence a contract sufficient in form and in substance so that there is no ground whatever for setting it aside as between the vendor and the purchaser, (b) that the purchaser has carried out all his obligations under the contract, (c) that there is in existence a title under the Code in the vendor (or in a third party who is able and willing at the instance of the vendor to complete the sale by registration), whether an undertaking is given to make out a title or not, at a date fixed for completion or, where no time is fixed, within a reasonable time from the date of the contract, and (d) that the vendor has no duties to perform other than those of executing the transfer and perfecting the purchaser's title by registration.
>
> In my judgment, the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done all that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser. In other words, a purchaser does not get a title in equity until the vendor has done all that is necessary to perfect the purchaser's title.

**[256]** On the other hand, the outcome in *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145; [1974] 1 LNS 51 was that an agreement to grant a permit or licence to enter the land and to carry out mining on the land could give rise to an equitable interest which was capable of protection via a private caveat. Put simply, the agreement was construed as giving rise to a caveatable interest. The judgment in that case was delivered by Gill FCJ. The facts were as follows. The respondent was the lessee of the subject land. Pursuant to an agreement between the appellant and the respondent, the appellant was given a permit or licence to enter the land and mine it. The appellant relied upon the agreement and entered into occupation of the land and spent large sums of money to commence mining operations. They entered a caveat to protect their interest. The High Court removed the appellant's caveat holding that the agreement did not give the appellant any caveatable interest. The appellant's main ground of appeal was that the learned judge misdirected himself in holding that the appellants could not bring their claim under any of the provisions of s 323(1) of the National Land Code and that a caveat could not be lodged in assertion of the rights under the agreement dated 1 July 1970. The appellant argued that a claim to an interest in land arising out of a contract or agreement is sufficient to make it a caveatable interest and therefore to support a caveat.

**[257]** The appellant contended that the agreement dated 1 July 1970 gave them an interest in the land in question which could be protected by a caveat. The Federal Court held that equity will protect the appellant's rights under the agreement and went on to hold that the respondents held the land comprised

in the mining lease in trust for the appellants to permit the appellants to mine it for the duration of the permit. Thus, the Federal Court opined that the appellants were also entitled to lodge a caveat under s 323(1)(b) of the National Land Code . As to the question whether the appellant is entitled to claim any beneficial interest over the land which is capable of protection via a caveat, the approach of the Federal Court may be seen in the following passage (p 148) where reference was made by Gill FCJ to the judgment of Jessel MR in the well-known case of *Lysaght v Edwards* (1876) 2 Ch D 499.

**[258]** The passage reads as follows:

> The next question to be considered is whether by virtue of the agreement the appellants can claim to be beneficially entitled under any trust affecting the land in question or any interest therein. In *Lysaght v Edwards* (1875–6) 2 Ch D 499 (506–507) Jessel MR said:
>
> > It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine?
> >
> > It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.
> >
> > In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money.
> >
> > ... Now, what is the meaning of the term 'valid contract?' 'Valid contract' means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser – a contract binding on both parties.'

**[259]** After setting out the principle emanating from *Lysaght v Edwards* as per the passage which we have just reproduced, Gill FJ (who also wrote the judgment in *Ong Chat Pang*'s case) continued and stated:

> It is true that there has been no sale here but the same principle applies if the contract is in substance a sublease or even a licence coupled with interests for valuable consideration. Thus, in *Bannister v Bannister* [1948] 2 All ER 133 the Court of Appeal held that 'it is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another.' In *Gissing v Gissing* [1970] 2 All ER 780 789 Lord

Diplock said:

> Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as trustee on trust to give effect to the beneficial interest of the claimant as *cestui que* trust. The legal principles applicable to the claim are those of the English Law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of resulting, implied or constructive trusts.

**[260]** Gill FJ opined that the appellant had an equitable interest over the land by reason of the agreement. Indeed, the learned judge said, '... in view of the fact that the appellants relying on that agreement entered into occupation of the land and spent large sums of money to commence mining operations, *equity will protect their rights under the agreement* and *hold that the respondents are holding the land comprised in the mining lease in trust* for the appellants to permit the appellants to mine it for the duration of the permit'.

**[261]** Before us counsel for the plaintiff said that the plaintiff was pursuing an equitable remedy based on the concept of a remedial constructive trust and not a bare trust. Counsel for the plaintiff said quite unequivocally that he is not relying on a bare trust. He said that a constructive trust and a bare trust are different concepts. He said that a bare trust is a naked trust. In our view, the position of a bare trustee is quite settled. Hence, the payment of a deposit or part payment will not suffice to establish a bare trust against the vendor. The bare trust usually (but not exclusively) arises in a conveyancing or sale context where the vendor has sold the property to the buyer under an executory contract where the purchaser has fulfilled his side of the bargain and the vendor has 'divested' ownership over the property and what remains is only for the property to be transferred into the name of the purchaser. The basic premise upon which this type of trust is predicated is that there is nothing more that the purchaser needs to do and has done everything necessary for the property to be transferred to his name. In those circumstances, the vendor is regarded in equity as a bare trustee. The trustee under a bare trust has no overt duties other than to hold the property in trust for the purchaser. If the vendor (bare trustee) refused to complete the transaction and declines to execute the requisite transfer forms or refuses to apply for consent of the state authority, then the purchaser can avail himself of the remedy of specific performance to compel the vendor to do that which he is refusing to do. And if the vendor failed to do so or refused to do so, the court is empowered to direct the registrar of the court to execute the relevant documents in the name of the vendor. As for an equitable claimant under a constructive trust, the fact that the balance of the purchase price had not been settled is not a pre-requisite.

**[262]** Thus, to quote the Federal Court in *Samuel Naik*, 'if there is a clear valid contract for sale the court will not permit the vendor afterwards to transfer the legal estate to a third person'. The language employed by the Federal Court is strikingly similar to that of the Supreme Court in *Yeong Ah Chee*. That essentially is the basic mechanism of a constructive trust.

**[263]** Of course, we are aware that on the facts, *Samuel Naik* was a case involving a bare trust. But that does not detract from the views articulated by the Federal Court in that case on the topic of a constructive trust which we regard as a correct and clear exposition of the law on this point and which is plainly binding on this court. At any rate, and more to the point, we are bound by the decision of the Federal Court in *He-Con* where the *Yeong Ah Chee* principle was restated.

**[264]** Hence, to summarize the legal position, whilst a bare trust is established upon payment of the full purchase price by the purchaser, the non-payment of the balance of the purchase price is not a bar to a claim for relief under a constructive trust ie under the *Yeong Ah Chee* principle.

**[265]** At the risk of repetition, it is necessary to emphasize that the bare trust and constructive trust are two distinct and separate equitable concepts. And we are here dealing with an equitable claim under a constructive trust.

**[266]** We move on now to the concept of the *remedial constructive trust*. The concept of the remedial constructive trust was discussed by the Federal Court in *RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal* [2016] 1 MLJ 175; [2015] 1 CLJ 309 (FC) and it was emphasised, inter alia, that the moral quality of the defendant's conduct was a consideration in determining whether a proprietary remedy is appropriate. The relevant parts of the Federal Court's judgment read as follows:

> [27] A proprietary remedy may also be awarded where it is appropriate. In *Lonrho Plc v Fayed and others (No 2)* [1992] 1 WLR 1 at p 9, Millett J cited the following passage from Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies* (2nd Ed) at p 327, which said that when appropriate the court would grant a proprietary remedy.
>
> When appropriate, the court will grant a proprietary remedy to restore to the plaintiff property of which he has been wrongly deprived, or to prevent the defendant from retaining a benefit which he has obtained by his own wrong. It is not possible and it would not be desirable, to attempt and exhaustive classification of the situations in which it will do so. Equity must retain what has been called its inherent flexibility and capacity to adjust to new situations by reference to the mainsprings of equitable jurisdiction.
>
> [28] In *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, the Canadian Supreme Court per La Forest J observed that 'there is no

unanimous agreement on the circumstances in which a constructive trust will be imposed' and identified a number of factors that may be relevant in determining whether to award a proprietary remedy: A

A constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property.

Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy. More important in this case is the right of the property holder to have changes in value accrue to his account rather than to the account of the wrongdoer ... B

*The moral quality of the defendants' act may also be another consideration in determining whether a proprietary remedy is appropriate.* C

*Allowing the defendant to retain a specific asset when it was obtained through conscious wrongdoing may so offend a court that it would deny to the defendant the right to retain the property*.

[29] In *Muschinski v Dodds* (1985) 62 ALR 429, the High Court of Australia per Deane J thus enunciated on the remedial constructive trust in Australia: D

The acknowledgment of the institutional character of the constructive trust does not involve a denial of its continued flexibility as a remedy (cf *Wirth v Wirth* (98 CLR) at p 238. The institutional character of the trust has never completely obliterated its remedial origins even in the case of the more traditional forms of express and implied trust. E

This is a fortiori in the case of constructive trust where, as has been mentioned, the remedial character remains predominant in that the trust itself either represents, or reflects the availability of, equitable relief in the particular circumstances.

*Indeed, in this country at least, the constructive trust has not outgrown its formative stages as an equitable remedy and should still be seen as constituting an in personam remedy attaching to property which may be moulded and adjusted to give effect to the application and inter-play of equitable principles in the circumstances of the particular case* ... The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles ... Viewed as a remedy, the function of the constructive trust is not to render superfluous, but to reflect and enforce, the principles of the law of equity. F G H

Thus it is that there is no place in the law of this country for the notion of 'a constructive trust of a new model' which, 'by whatever name it is described, ... is ... imposed by law whenever justice and good conscience' (in the sense of 'fairness' or what 'was fair') 'require it' (per Lord Denning MR, *Eves v Eves* [1975] 1 WLR 1338 at pp 1341–1342; [1975] 3 All ER 768 at pp 771–772 and *Hussey v Palmer* [1972] 1 WLR 1286 at pp 1289–1290; [1972] 3 All ER 744 p at 747). (Emphasis added.) I

[30] Apparently, 'the remedial constructive trust has been accepted in Australia, New Zealand and Canada' (*Modern Equity* by Hanbury & Martin, at p 328), upheld in Singapore (see *Ching Mun Fong (executrix of the estate of Tan Geok Tee,*

> *deceased) v Liu Cho Chit* [2001] 3 SLR 10) and Hong Kong (*UBS AG v Stand Ford International Enterprises Ltd & Ors* [2002] 3 HKC 621) and accorded recognition by the Court of Appeal in *Tay Choo Foo @ Tay Chiew Foo v Tengku Mohd Saad @ Tengku Arifaad bin Tengku Mansur & Ors (all acting as administrators of the estate of Tunku Mansur bin Tunku Yaacob, deceased) and another appeal* [2009] 1 MLJ 289. And as pointed out by Rimer J in *Shalson and others v Russo and others* at pp 321–323, and in these grounds, *In re Eastgate* is hardly the only authority for the proposition that 'where a purchaser is misled into buying goods he is automatically entitled upon rescinding the contract to a proprietary right superior to those of all the vendor's other creditors, exercisable against the whole of the vendor's assets'. It is clear that a proprietary restitutionary right to money could be asserted. But is this an appropriate case to grant a proprietary remedy? ...
>
> We are mindful that *'a constructive trust [in the remedial sense] arises whenever the circumstances are such that it would be unconscionable of the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another*. It arises from circumstances which are, *ex hypothesi*, known to the legal owner, for if they were not his conscience would not be affected' ('Restitution and Constructive Trusts' 1988 Law Quarterly Review Vol 114 p 399, per Millett LJ at p 400). 'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee' (*Alfred C Beatty v Guggenheim Exploration Company et al* (1919) 122 NE 378 at p 388 (NY 1919), per Cardozo J). (Emphasis added.)

**[267]** A remedial constructive trust may be imposed as a remedy for a wrong which has been done to the equitable claimant. In *Atlas Cabinets & Furniture Ltd et al v National Trust Co Ltd* [1990] 68 DLR (4th) 161 at p 173, the British Columbia Court of Appeal in Canada, (per Lambert JA) lucidly explained the distinction between an institutional constructive trust and a remedial constructive trust concept as follows:

> A remedial constructive trust is a trust imposed by court order as a remedy for a wrong.
>
> The entitlement to that remedy may be a matter of substantive law, but the trust itself is not created by the acts of the parties, or even by the obligation to make restitution, but by the order of the court. As with other court orders, the trust will come into being when the order is pronounced, unless, in an appropriate case, the order is made retroactive or its coming into force is deferred.
>
> It may be that in many cases where a remedial constructive trust is imposed, the court will order that it be imposed with effect from the time when the situation arose which gave rise to the unjust enrichment: see *Rawluk v Rawluk*, supra. There must, of course, be a causal connection between the property in question and the unjust enrichment: see Sorochan v Sorochan, supra, and *Rosenfeldt v Olson* (1986) 25 DLR (4th) 472; 1 BCLR (20) 108; (1986) 3 WWR 403 (CA).
>
> *The remedial constructive trust must be distinguished from the substantive constructive trust which the court declares to have arisen, as a result of the conduct of the parties, and by the force of that conduct alone, at the earlier time when the relevant conduct occurred.*

*If a substantive constructive trust is found to have arisen in that way then there is no discretion remaining in the court to refuse to declare the existence of the trust*. As I have indicated, the difference between a substantive constructive trust and a resulting trust may, in cases where the property is restored to the settlor, be merely a matter of terminological preference. And I should add that I can see no reason why the recent developments in the law of remedial constructive trusts should alter in any way the long-standing principles governing substantive constructive trusts.

*But the ordering of a remedial constructive trust is only one of the remedies which may be ordered as a result of a wrong committed by one person against another that is properly categorized as unjust enrichment. The available remedies include an order to pay money, as damages,* and they include other remedies stemming either from legal origins or equity origins, as the circumstances of the case may require.

ANALYSIS OF THE SALIENT FACTS

**[268]** We will now proceed to analyse the salient facts.

**[269]** In the present case, the judge held that the defendants were not bare trustees as the plaintiff had not paid the full purchase price (under the SPBA) and in particular had not paid the redemption sum to MAA. Next, in so far as conduct is concerned, the judge took the view that the plaintiff just sat on their rights or entitlements and did not energetically or enthusiastically pursue their claim against Sharma and the defendants. In particular, the judge held that the plaintiff showed inertia, took no steps, and did nothing to assert their rights. For instance, the plaintiff did not take any steps to restrain D1 from implementing or executing the transaction with Sharma. The judge found that D1 took active steps to protect their interest and assert their entitlement over the land.

**[270]** The judge also found that the plaintiff did not take any steps to protect their rights over the land by entering fresh caveats. The plaintiff blamed their former solicitors, Messrs Sandosh Anandan. Thus, the defendants took the common stand that even if the plaintiff is able to establish that there was a constructive trust, the claim should be dismissed on the grounds of the plaintiff's indolence. It was argued for the defendants that equity will only aid the vigilant, and not the indolent. During the trial, counsel for the plaintiff candidly admitted that the plaintiff's indolence was the weakest aspect of the case.

**[271]** We turn now to DW1's evidence. In his witness statement, DW1 alluded to some of the agreements between Sharma and D1 and the various court orders that were obtained against Sharma and the plaintiff. He then said that D1 was not stopped by any laws to charge the land to D2 and that D1 does not know on what basis the plaintiff was claiming RM10,256,098.66 or whatever amount. He concluded his witness statement by saying that the

plaintiff just wanted to 'enrich themselves'. One aspect of DW1's answers during cross-examination deserves mention. It has to do with D1's knowledge as to why Suit 775 was filed and how it ended.

**[272]** DW1 agreed that Suit 775 was filed by Sharma about three weeks after D1 and Sharma had executed the Supplementary JVA dated 21 June 2007 and that Suit 775 which was filed on 13 July 2007, was likely to be a manifestation of Sharma's compliance with cl 7 of the Supplementary JVA. In answer to counsel's question, 'I put it to you that Ivory Indah would have known about the whole suit?' DW1 said, 'I supposed so, it's good to know'. Now this took place in 2007. And, DW1 had not even joined the Group in 2007. He joined the Group in 2011.

**[273]** But DW1 nevertheless seemed able to offer answers to questions on matters that took place even before he joined the Group. There was no comment about this aspect of DW1's evidence in the grounds of judgment.

**[274]** Obviously, Dato' Low would have been the right person to answer these questions. But he claimed that he was *too busy* attending to other corporate matters. He did not have time to attend court to answer questions pertaining to his dealings with Sharma.

**[275]** The question is whether D1 was unaware of Suit 775. Although DW1 said he was unsure, he eventually agreed that D1 could have easily found out the progress of the suit by doing a file search. The cross-examination was as follows:

> PC: now I put it to you that Ivory Indah, since Ivory Indah has an interest to know what happen therefore Ivory Indah was keeping track of the progress of this suit, agree or disagree?
>
> DW1: ya we are trying to PC: this suit
>
> DW1: which suit? Between the land owner and the lender?
>
> PC: no, no land owner and IB Capital
>
> DW1: ya the lenders, yes! Your question again sorry?
>
> PC: ya, Ivory Indah was keeping track of this case, this suit
>
> DW1: I'm not sure, just now I already answered I'm not sure
>
> PC: because seems to be sure lah
>
> DW1: no, no because it's more than 10 years already
>
> PC: to be fair to you I repeat the question because I don't want you to say that I trap you, that you are not ready
>
> DW1: it doesn't matter because whatever I said it won't distort the facts, you could lead me to say something wrongly but the fact is still the fact

PC: alright, so I put it to you that Ivory Indah was fully aware of how the suit ended

DW1: I'm not sure

PC: not sure. I put it to you that Ivory Indah ought to have known because the result of the suit could have easily been obtained by a search by simply conducting a court file search.

DW1: *yea maybe*.

**[276]** Although DW1 tried to downplay D1's knowledge of Suit 775, it is in the least improbable that Dato' Low was not keeping tabs on what was going on in Suit 775 particularly as it would, or may have a direct impact on D1's rights, interests and entitlements in and over the land. It is highly unlikely that D1 was unaware of the status of Suit 775. Indeed, if Dato' Low had testified, he probably would have had difficulty in trying to deny knowledge about Suit 775. He would also have had difficulty trying to explain why, after obtaining the order in Suit 240, D1 never bothered to contact the plaintiff with regard to the redemption statement. Dato' Low would have had to offer a credible explanation as to why the cause papers for OS 2106 were served at the plaintiff's former address. Since Dato' Low did not testify, it is only fair and appropriate that an adverse inference under s 114(g) of the Evidence Act 1950 be drawn against D1. As such, we will infer that if Dato' Low had testified, his answers to the several key questions concerning the plaintiff's interest over the land and in particular the redemption sum payable to the plaintiff, would have been against D1 and in favour of the plaintiff.

**[277]** Next we have DW2's evidence. He said he was the Commercial Manager of the Bank for Penang. He signed D2's letter of offer dated 5 August 2013 which made no mention of any redemption payment to the plaintiff.

**[278]** During cross-examination he confirmed that the Annexure to the Charge made no reference to the supplementary letter of offer. He agreed that the Annexure to the Charge referred to the letter of offer date 17 July 2012. He also agreed that the letter of offer dated 17 July 2012 stated that the purpose of the banking facility was to enable D1 to purchase the land *and to pay the redemption sums to MAA and the plaintiff*.

**[279]** In examination in chief, DW2 said,

Q9: Do you recognize what is the document at pp. 4-7, CBD1?

A: This is the Court Order dated 19.9.2011 obtained by Ivory against Dato' Krishna made in the Penang High Court Suit No. 22-240-2007 ('the Order of 19.9.2011'). The Order of 19.9.2011, as I understand it, compelled the specific performance of various agreements between Dato' Krishna and Ivory in relation to the Land, and for the Land to be transferred to Ivory. The Order of 19.9.2011 was forwarded to the Bank by Ivory and the Bank was also informed that Dato' Krishna's

appeal to the Court of Appeal against the Order of 19.9.2011 was struck out on 2.2.2012. This can be seen in the sealed Order dated 2.2.2012 at p. 8-9, CBDI.

Q10: Do you recognize what is the document at pp. 73-75, CBD1?

A: Yes, this is the Court Order dated 2.5.2013 obtained by Ivory against Dato' Krishna made in the Penang High Court Suit No. 22-240-2007 ('the SP Order') which, as I understand it, is a further Order for specific performance for the transfer of the Land to Ivory. By this, SP Order, amongst others:

(a) the Deputy Registrar was to take all steps and execute the necessary documents on behalf of Dato' Krishna (who had been adjudicated a bankrupt) to effect the transfer of the Land to Ivory;

(b) a redemption statement was to be issued by Malaysian Assurance Alliance Berhad (now known as Zurich Insurance Malaysia Berhad) ('MAA') to Ivory and Ivory's bank was to redeem MAA's legal charges over the Land;

(c) the Director General of Insolvency, the Department of Insolvency of Malaysia and the Land Registry of Pulau Pinang are to give effect to the Order of 19.9.2011 and the SP Order.

Q11: What is the significance of the SPA, the Order of 19.9.2011 and the SP Order?

A: Since the vendor of the SPA, Dato' Krishna was adjudicated bankrupt on 7.5.2010 and 22.10.2010 respectively (the bankruptcy search results can be seen at pp. 208 and 209, CBD1 respectively), we in the Bank were informed that Ivory obtained the Orders so that it can then apply to the Bank for credit facilities, part of which was to part finance the purchase of the Land. The Land was to be charged as security for the credit facilities.

...

Q13: Were there other restrictions on the Land?

A: (a) There were private caveats lodged by third parties over the Land ('the private caveats'), details of which are as follows:

(i) by the Plaintiff on 18.7.2006 and 30.11.2006 vide Presentation No 0799B2006010195 and 0799B2006017740 respectively ('the Plaintiff's caveats'). The Plaintiff's Caveats had expired, after 6 years, by 18.7.2012 and 30.11.2012 respectively;

...

Q15: Did the Bank know what happened to the private caveats on the Land?

A: The Bank was subsequently informed by Ivory that its then solicitors, Messrs Ong & Manecksha, had on 3.12.2012 filed the applications to remove all the caveats, including the plaintiff's caveats, over the Land.

...

Q17: Do you recognize what is the document at p. 217, CBD1?

A: Yes, this is the Court Order dated 22.1.2013 obtained by Ivory against the Plaintiff under Penang High Court Originating Summons No: 24-2106-12/2012.

The Court has ordered that the plaintiff's caveats be removed and that the Plaintiff is prohibited from entering any further caveats on the Land.

Q27: The Plaintiff in the Re-Amended Statement of Claim has alleged that the Plaintiff is the beneficial owner of the Land and the Bank knew of this. What is the Bank's response to that?

A: I disagree. The Bank was not aware at the material time of the Plaintiff's alleged interest in the Land and disagree that the Plaintiff is the beneficial owner of the Land. From what is seen in the Plaintiff's claim, it would appear the Plaintiff, if at all, is only owed monies by Dato' Krishna. The Plaintiff's private caveats over the Land had expired and the Bank was informed that these caveats were in any event ordered to be removed by the Court Order of 22.1.2013. When the Bank released the credit facilities to Ivory, and paid for the discharge of MAA's Charges as well as obtained the Legal Charge over the Land, there was nothing to indicate to the Bank that the Plaintiff had at the material time an existing interest in the Land.

Q28: The Plaintiff in the Re-Amended Statement of Claim also alleged that the Bank had knowledge or means of knowledge of the Plaintiff's beneficial interest over the Land. What is the Bank's response to that?

A: (a) I disagree. The Bank never had any dealing or relationship with the plaintiff with regard to the Land;

(b) the Bank was never at any material time informed of or was privy to the purported relationship and/or dealings (if any) between Dato' Krishna and the Plaintiff and/or Ivory;

(c) at the time the Bank obtained the Legal Charge, the Bank had no knowledge that the Plaintiff had an alleged validly and existing interest in or claim over the Land;

(d) there was nothing in the title search on the Land to show that the plaintiff had acquired any interest' over the Land.

Q29: The Plaintiff in the Re-Amended Statement of Claim also alleged that the Bank acquired knowledge of the plaintiff's 'beneficial interest' in the Land as prior to the creation of the Legal Charge, the Bank allegedly was in possession of an agreement dated 30.1.2008 entered between Dato' Krishna and Ivory. What is the Bank's response to that?

A: (a) I disagree. The Bank did not any have knowledge of the Plaintiff's alleged interest in the Land prior to the creation of the Legal Charge and the Bank has never seen the purported agreement dated 30.1.2008 entered between Dato' Krishna and Ivory until after the action herein was filed by the Plaintiff. All that the Bank knew was that the Plaintiff had lodged the caveats over the Land, which Ivory successfully removed (and which in any event had expired) and that there was no appeal against such Order for removal of the private caveats.

(b) I briefly state that the Bank has at all material times acted in good faith in making available the financing to Ivory and in accepting the Legal Charge over the Land, and have paid for the redemption of MAA's Charges. I believe the Plaintiff has no basis to sue the Bank in this matter.

Q30: Is there anything that the Bank wish to add?

A: (a) Yes. It cannot be disputed that the MAA's Charges were only redeemed by using the monies disbursed under the financing granted by the Bank and Ivory's monies;

(b) The Plaintiff chose to file this action only after the MAA's Charges had been redeemed by the Bank and Ivory. Certainly, the Plaintiff should not be entitled at all to the Land free of encumbrances as it had not paid anything towards the redemption of MAA's Charges over the Land or even for the Land itself.

DW2's supplementary witness statement

Q3: Can you please explain why were the 2 said letters of offer issued by the Bank to Ivory?

A: (a) When Ivory approached the Bank for financing for the purchase of the Land, *the Bank was informed that Ivory needed financing to redeem MAA's Charges* and will resolve the private caveats lodged by the Plaintiff ('*IB Capital*'). Hence, the Letter of Offer was issued and the said purpose of the financing was reflected in clause 5 of the Letter of offer at p. 127, 16.

(b) The Bank informed Ivory that any private caveats lodged over the Land would have to be dealt with first by Ivory, before the Bank could agree to disburse any financing amounts or to redeem the Land from MAA or make any disbursements of any monies under the credit facilities.

**[280]** During cross-examination, DW2 said:

PC: yes! Now, do you also agree with me that on the face of this order, I think I won't ask this, because my learned friend Mr. John Khoo may jump up! Alright, look at Q&A 14, Q&A 14 said, did Ivory obtain credit facilities from bank? Yes, it did, and part of the facilities was to be used towards redemption of MAA charges and to part finance Ivory's purchase of the land, the bank was agreeable to grant the credit facility totalling 76 million, however as there were the aforesaid private caveats on the land, the bank informed Ivory that the private caveat lodged over the land would have to be dealt with first by Ivory, before the bank could agree to disburse any financing amount or to redeem the land from MAA or to make disbursement of any monies under the credit facilities, you agree with me that even then, in saying this, would you agree with me that the bank require only the caveats apart from IB Capital's caveat? Or caveats other than IB capital's caveats be removed?

DW2: all caveats

PC: all caveats?! *For IB Capital's interest do you agree with me that the bank knew that part of the the [sic] loan was to be used to redeem or to pay to IB capital? To settle it's claim based on the caveat? Do you agree? You are the one who processed the loan, right*?

DW2: *ya*

PC: *part of the loan was to be used to settle IB capital correct?*

DW2: *based on the first LO yes*

PC: ya based on the 1st LO ya

DW2: ya, then subsequently it was removed

...

PC: To! Yes, it appeared that other than MAA charges, there were no other issues concerning the land, the bank agreed to grant the credit facility to Ivory totaling 76 million, so I put it to you that the bank actually had agreed to grant the credit facilities much earlier, even in 2012 the bank had already agreed to grant the credit facilities, it's not only after removal of all caveats, agree or disagree?

DW2: yes

PC: yes ya

DW2: yes

...

PC: alright, can you look at page 47, look at page 47, the schedule referred to herein, Schedule 1, look at item 6, the date of Sale and Purchase Agreement (if applicable) (a) Sale and Purchase Agreement dated 6th August 2007; (b) Agreement dated 30th January 2008, and (c) Deed of settlement dated 30th January 2008, alright, so these credit facilities, general facility agreement was dated 6th August 2013, if you look at item 1, so as of item 6th, at least as of 6th August 2013, *the bank was already aware of this agreement dated 30th January 2008 which you said the bank was not aware right*? Right?

DW2: *ya but I don't have a copy of this*

...

D2C: because the loan agreements, I think in the main witness statement, I am just trying to cut the thing short, the main witness statement of Mr. Teh is that, the supplemental letter of offer was issued, without provision to use the financing to IB Capital the reason being that the caveat was removed

Judge: yes

D2C: so that is the cerita so to speak Judge: yes

D2C: so now, regardless, my submission would be regardless whatever is in the loan agreement, it doesn't make a difference but we seem to be spending a lot of time on this 30th January

Judge: yes

D2C: So, I'm just wonder where my learned friend is heading to

...

PC: my lady simple answer is if you refer to Q&A 29 this witness said the bank has no knowledge of this agreement dated 30th January, then I'm showing to him that he's not telling the truth, am I not entitled to show that he's not telling the truth?

D2C: so what?

PC: so what? Then we go for submission! So what? Then we go for submission not for you to stop me you know!

D2C: he can says whatever he wants, the crux actually, I'm just curious where he's heading to

Judge: yes, yes

D2C: but even if the witness knows or doesn't know there is this agreement, I have to be very blunt, so what?

PC: then why did you put in this witness statement if its not relevant?

Judge: the loan has been disbursed, the land has been transferred, registered in the 1st defendant's name are you saying the bank is negligent in approving the 76 million

D2C: ya

Judge: wrong documents been processed you know?!

PC: my lady what we are saying is very simple, the bank knew of the plaintiff's interest

Judge: ya

PC: and they claimed that they did not know, they knew of the plaintiff's interest and therefore the consequence of it of course we will of course leave it for submission but the problem here is they are denying that they knew of the interest and even have the audacity to claim in the witness statement that they don't know about this agreement dated 30th January 2008, so we have to produce evidence to show that this witness is not telling the truth and then the consequence of it of course we will have to come back to my lady to convince

Judge: because there are many court orders saying A to Z what they are supposed to do

PC: yes we accept

Judge: because the law says it's not about interest, you know, for this case it must also comes with payment kan?

PC: the consequence of it, we will submit

Judge: we are not talking about papers and wordings, we are talking about action, active action

PC: that is the weak part I accept that, that is the weakest part of the plaintiff's case

Judge: yes

...

PC: now look at F6, pages 126 to 156, this is the letter of offer dated 17th July 2012, given by the 2nd defendant to Ivory Indah right?

DW2: yes

PC: and is dated 17th July 2012, and this letter of offer has been stamped, right?

DW2: ya

PC: if you refer to the F1, page 266, 265 and 266, 265 item 4, this is the *charge annexure, filed in the land office, if you look at item 4, the only letter of offer mentioned here is the one dated 17th July 2012, right*?

DW2: ya

PC: Yes ya! And if you look at page 266, *security documents ya, para 6, also the only letter of offer mentioned is 17th July 2012*?

DW2: yes

PC: so, the *supplementary letter of offer has never been mentioned in the charge annexure agree*?

DW2: *ya*

PC: alright! now let's look at the letter of offer itself, page 126-156, page 142, Teh Chee Seng, there's one signature verified by this Mr. Teh Chee Seng, team manager is that you?

...

PC: I see. Now, if you look at page 127 the one which has been referred to by, sorry, I think she didn't refer to, 127, para 5, under TF-I 'to redeem from Malaysia Assurance Alliance Berhad, 18 capital sdn bhd (including the accrued interests) and to part finance the purchase of a piece of freehold vacant land at Kebun Bunga Pulau Pinang', so it says here to redeem from IB capital also right?

DW2: yes

PC: so you are aware of this ya!

DW2: ya

PC: and if you look at page 135, sorry 131 first, 131, somewhere at the bottom, 'TF-1'*payment of the bank's purchase price is to redeem* from MAA, *IB Capital*, including the accrued interest' right? You have seen that right, so you are aware?

DW2: ya

PC: and also at page 132, the top of it, B, 'TF-I shall be disbursed to the panel solicitors as stakeholders, *the facility shall only be disbursed* to MAA and *IB Capital* upon confirmation that the legal charge over the land can be perfected without any restriction and private caveat, alright, what is TF-1?

DW2: Term Financing

PC: Term financing, I see, I see. Now, can you look at page 135, in paragraph 23, there are these conditions precedent, 'the bank's purchase price shall be disbursed subject to fulfilment of the bank's standard conditions for disbursement, including but not limited to the following. So, there is these conditions precedent, right?

DW2: yes

PC: and one of the condition precedent, if you look at page 137, some of this condition precedent, can you look at, first look at item 12, submission of DGI approval/confirmation for the disbursement of the balance purchase price to settle payments to MAA, IB capital and other private caveator, right? You know about this right, since you are the one who processed this

DW2: ya

PC: yes ya?

DW2: ya

PC: and para 13, letter of consent to transfer and charge from private caveat holders and undertaking not to enter further private caveat or to encumber the said land in any way to refund the bank in the event that the memorandum of transfer and charge cannot be created right? There's this provision, also right?

DW2: ya

PC: and if we look at para 15, it says *letter of undertaking* from MAA, *IB Capital* and Ivory Indah *to refund the bank in the event that the transfer and charge cannot be created in favour of our bank right*? So all these are there, alright?

DW2: *ya*

PC: *so you are fully aware when you processed this loan that part of the loan was to be used to settle the plaintiff's claim right*?

DW2: *ya*

**[281]** Clearly from the notes of evidence it could be seen that there was an attempt to 'insulate' DW2 (and by extension D2) from the effects of the letter of offer dated 17 July 2012, which is quite obviously a 'smoking gun' document which fixed D2 with knowledge of the plaintiff's interest over the land. As mentioned earlier, on 6 August 2007, Sharma entered into a sale and purchase agreement with D1 to sell the subject property to D1 for RM75m.

**[282]** Sharma had assured D1 that he was negotiating with the plaintiff to resolve the issues with the plaintiff and to finalise the amount which he needed to pay the plaintiff to remove its caveats. On 31 October 2007, D1 through its letter to Sharma reminded him that he had agreed (per the JVA) to furnish them with the letter of consent from the plaintiff.

**[283]** What can be seen quite clearly and unequivocally from the several documents that were referred to in the preceding paragraphs is that D1 was fully aware the plaintiff's caveats and the basis for entry of those caveats. The grounds that were relied upon by the plaintiff in the respective Form 19B at the time of entry of the private caveats was that the plaintiff had given a loan to Sharma and that the land was security and the plaintiff had a caveatable interest (first caveat). The second caveat was predicated on the SPBA. These are all clearly stated in the statutory declarations which accompanied the Form 19B.

**[284]** At any rate, it is quite undisputable that all times prior to the lapse of the plaintiff's caveats, D1 regarded the plaintiff as having an interest in and over the land and that for the plaintiff's caveats to be cancelled, the plaintiff must be paid the 'redemption sum' arising out of the loans that were given by the plaintiff to Sharma.

**[285]** Indeed, the contemporaneous documents between D1 and Sharma, also alluded to the possibility of the plaintiff commencing 'foreclosure' proceedings. From the documents, D1 treated the plaintiff as being at par with MAA, except that the latter had the benefit of the MAA charges whereas all that the plaintiff had was the plaintiff's caveats. In any event, although the plaintiff did not have a registered legal charge over the land by way of security for the

loans which had been granted to Sharma, it is clear that the plaintiff was treated by D1 as a party having rights akin to a party with a registered legal charge. On that score, we agree with the submissions that were made by counsel for the plaintiff that at the very least, the plaintiff was an equitable chargee.

**[286]** The subsequent correspondence between the solicitors for Sharma, D1 and the plaintiff more than amply bears out the fact that the plaintiff was regarded or treated as having an interest over the land and the caveats would only be cancelled upon payment of the 'redemption sum'. To that end, D1 (through their solicitors) sought to obtain the 'redemption statement' from the plaintiff. Cleary, D1 treated the plaintiff as having an interest over the land. It is way too late for D1 to contend otherwise. The plaintiff's interest is that of an equitable chargee. In any event, the plaintiff's overarching interest is that pursuant to the SPBA and upon paying RM8.8m to Sharma, they acquired beneficial ownership under a constructive trust.

**[287]** Counsel for D1 said that equitable relief should be denied as the plaintiff was guilty of laches. He said the plaintiff did nothing to assert their rights as the alleged beneficial owner of the property. In response, the plaintiff's counsel said that laches is an equitable defence and that it is not available to D1 as they have not come with 'clean hands'. First, it is important to understand that mere delay per se, is insufficient to give rise to laches. Rather, laches is established when two conditions are fulfilled.

**[288]** Obviously, there must be unreasonable delay in the commencement/prosecution of legal proceedings. Secondly, it has to be established that the consequences of delay render the grant of any relief unjust in all the circumstances.

**[289]** The principle in this regard is to be found in the following passage of Lord Selborne's judgment in *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 where he said:

> But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. *Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy*.

**[290]** In *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202; [1989] 1 CLJ Rep 219; [1989] 1 CLJ 693, Edgar Joseph Jr J (as he then was) said that laches was 'inaction with one's eyes open'. At p 237 of the judgment he said:

Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time.

He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant.

The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 Halsbury's Laws of England (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open.

**[291]** More recently, in *Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals* [2017] MLJU 445; [2017] 1 LNS 622 the Court of Appeal per Abdul Rahman Sebli JCA (as he then was) expressly endorsed the observations of Hashim Yeop Sani J in *Yong Nyee Fan*'s case.

**[292]** The Court of Appeal said:

[44] In any event the respondents were guilty of laches. In *The Principles of Equitable Remedies* (2001, 6th Ed), the learned authors have this to say on the common law doctrine of laches:

> Laches is established when *two conditions are fulfilled*. In the first place, *there must be unreasonable delay in the commencement or prosecution of proceedings*; in the second place, in all the circumstances *the consequences of delay must render the grant of relief unjust*.

[45] In *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182; [1978] 1 LNS 244 the Federal Court made the following observations:

> To set out the general principles first, it is an established rule of equity that *a plaintiff in equity is bound to prosecute his claim without undue delay. A court of equity would refuse its aid to stale demands, ie where the plaintiff has slept upon his right and acquiesced for a great length of time. For 'laches' literally means negligent inactivity.* He is then said to be barred by his laches (*Halsbury's* 3rd Ed Vol 14, p 641). In determining whether there has been such delay as to amount to laches the main points to be considered are acquiescence on the part of the plaintiff and secondly whether any change of position has occurred on the defendant's part.
>
> Of course, acquiescence depends on 'knowledge, capacity and freedom'. It is not necessary however that the plaintiff should have known the exact relief to which he was entitled. As regards the change in the defendant's position regard must be had whether the defendant has lost the evidence necessary for meeting the claim, for a Court of equity will not allow a dormant claim to be set up when the means of resisting it have perished.

[46] Under s 32 of the Limitation Act, the court of equity is allowed to refuse relief on the ground of acquiescence or laches. The section reads as follows:

> 32. Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

**[293]** In our view, the delay is to be reckoned from the time the latter of the plaintiff's caveats lapsed, ie 29 November 2012. There was nothing that the defendants could do when the plaintiff's caveats were still valid. The caveat was a restraint on dealings. The plaintiff lost their hold or grip over the land on 5 September 2013.

**[294]** As such, that to us, is the operative date when there was a breach of trust that was committed by the defendants as constructive trustees. There is no issue of time-bar whatsoever. The period of delay or inaction is therefore from 29 November 2012 until 5 September 2013. Suit 20 was filed on 29 January 2014. It was effectively a period of around a year or thereabouts. It was by no means a spectacular delay and it cannot be said that laches had set in. In *Alfred Templeton* Justice Edgar Joseph Jr reviewed the jurisprudence on laches. He alluded (p 237) to several cases where the plaintiff succeeded despite 'spectacular' delays:

> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant.
>
> The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy. put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 *Halsbury's Laws of England* (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one's eyes open'.
>
> Now, can lapse of time and delay, however gross, in a suit seeking final, as opposed to interlocutory relief, of itself amount to the equitable defence of laches.
>
> It is clear that delay in some circumstances can amount to evidence from which the inference can be drawn that the plaintiff has released (or waived, there seems to be no difference) the claims which he asserts: lapse of time always gives rise to a presumption that a stale suit is ill-founded. for a reasonable man is not likely to sleep on his claims if they are well-founded. Whether it does or does not is a question of fact in each case.
>
> It is possible to point to a number of cases in which plaintiffs have been successful in spite of spectacular delays. In England, in *Burroughes v Abbott* [1922] 1 Ch 86, rectification of an instrument was granted after a delay of 12 years; in *Weld v Petrie*

A [1929] 1 Ch 33 the Court of Appeal held that a mortgagor's redemption suit was not barred by a delay of 26 years and in *Pickerring v Lord Stamford* (1795) 30 ER 787, it was held that after a delay of 35 years, a portion of a testator's residuary estate which had been devoted by ten trustees of the testator's will to charity was really held by them on trust for the testator's next of kin. In Australia, a decree of specific B performance was granted by the High Court in *Fitzgerald v Masters* (1956) 95 CLR 420, 26 years after the cause of action arose and in *Bester v Perpetual Trustee & Co Ltd* (1970) 33 NSWR 30. Street J rejected a defence of laches where a plaintiff waited 20 years before commencing a suit to rescind a transaction on grounds of undue influence. There are many cases which indicate that mere delay is not a C defence in equity. In 1795, in *Pickering v Lord Stamford* (1795) 30 ER 787 Arden MR inclined to the view that delay in a situation where no statute of limitation applied, could have legal effect only if it amounted to a release implied from conduct or was coupled with detriment to the defendant or a third party.

In *Fitzgerald v Masters* (1956) 95 CLR 420 equitable relief was granted after an D inordinate length of time had elapsed. On the point under discussion, Dixon CJ and Fullager J at p 443 held that there were no circumstances apart from delay for refusing relief, thereby (and in my opinion, correctly) holding that mere delay of itself cannot constitute laches. In *Fullwood v Fullwood* (1878) 9 Ch D 176 Fry J held that mere lapse of time affords no bar in equity.

E My research into the authorities on the subject leads me to the conclusion that there are no fixed rules or principles on which the court acts and each case is considered on its merits and particular facts. In the case of *Re Jarvis* [1958] 2 All ER 336 Upjohn J said at p 341:

> F I have been referred to a number of textbooks and authorities on this question of laches, acquiescence and delay, but I forbear from referring to them, for in this realm of law each case depends so much on its own facts that the citation of other cases having some points of similarity and some of difference does not really assist.

G **[295]** Looking at the facts and circumstances here, whilst there was some delay and inaction on the plaintiff's part, the delay was not spectacular or inordinate. And it is important to emphasize that this was not a case of innocent parties who were misled or induced into purchasing the property after the plaintiff's caveats had lapsed. Far from it. The defendants knew exactly H what was at stake and they took advantage of the plaintiff's indolence. There was a gap of about a year within which the defendants were able to slip past the plaintiff.

I **[296]** In light of the circumstances which presented themselves and the defendants conduct (of which more is elaborated in the later part of this judgment), we are not satisfied that the defendants have established a basis for the conclusion that (to quote Edgar Joseph Jr in *Alfred Templeton*), it would be unjust to give a plaintiff a remedy where they have by their conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by their

conduct and neglect they have, though not waiving the remedy, put the defendants in a position in which it would not be reasonable to place them if the remedy were afterwards to be asserted. The delay here was not at all spectacular. A

**[297]** Counsel for the plaintiff put it slightly differently. He said that it does not lie in the mouth of the defendants to assert the equitable defence of laches as they have not come with 'clean hands'. This is because of their inequitable conduct amounting to equitable fraud. Any which way that one looks at it, the defendants were aware at all times of the plaintiff's interest. They knew of the plaintiff's caveats and of the basis for the caveats. B C

**[298]** The defendants knew that the redemption sum had to be paid to the plaintiff. They made no enquiry to determine whether the redemption sum had been paid. They demonstrated an indifference, or nonchalance, or a 'wilful blindness' towards the plaintiff's interest over the land. The defendants were probably encouraged by the fact that the plaintiff's caveats were soon going to lapse and since there appeared to be no overt activity on the plaintiff's part, they looked upon it as an opportunity which had presented itself so that the title could be transferred to D1 and for a charge to be registered in favour of D2. Essentially, the defendants took advantage of the plaintiff's inertia. They were no misled or induced in any way. They just turned a 'blind eye' to the plaintiff's interest. D E

**[299]** Again, Dato Low had a lot to answer in respect of his state of knowledge as regards the redemption sum that was payable to the plaintiff. D2 did not fare any better. Their own documents showed that they knew about the plaintiff's interest and that a redemption sum was payable to the plaintiff. Yet, they made no enquiry as to the status of the redemption sum that was payable to the plaintiff. DW2 took refuge from his ignorance of the relevant documents which indisputably showed that there was a redemption sum that was payable to the plaintiff. F G

**[300]** As mentioned earlier, it is indisputable that D1 had always treated the plaintiff as a party to whom a redemption payment had to be made to secure the cancellation of the plaintiff's caveats. D1 had even considered the plaintiff as having a possible right to foreclose on the land. Thus, D1 cannot be heard to say that they do not recognise the plaintiff's right or entitlement over the land. H

**[301]** Indeed, for all intents and purposes, D1 had acquiesced to the plaintiff's status as equitable chargee. During submission, counsel for D2 made the startling proposition that the National Land Code did not recognise equitable interests. That submission is contrary to the long-established position that equitable rights sit harmoniously with legal rights under the National Land I

Code. As mentioned earlier, in *Mahadevan & Anor v Manilal*, Salleh Abas CJ said (p 270):

> Examination of courts' decisions clearly show that the courts have resorted to equitable principles and consistently held that an agreement or an arrangement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien within the provisions of the National Land Code or the previous Code is executed or created.

**[302]** He went on to say (p 271):

> There is, however, no provision in the National Land Code prohibiting the creation of equitable charges and liens. The Code is silent as to the effect of securities which do not conform to the Code's charge or lien. *Therefore equitable charge and liens are permissible under our land law*.

**[303]** Counsel for the plaintiff said, 'at the very least the plaintiff is an equitable chargee by reason of having lent monies to Sharma'. Of course, if one were to take a simplistic view, the plaintiff's interest can be categorised as a right in personam and having no (caveatable) interest whatsoever in and over the land. That is exactly the position that D1 and D2 invited us to conclude. Respectfully, and having regard to all the contemporaneous documents, we find ourselves unable to accept that invitation. We absolutely reject it. Ordinarily that may have been the position. But not on the peculiar and particular facts of this case.

**[304]** For completeness, we must say quite categorically that whilst the plaintiff had a contractual right to the land after paying the redemption sums to MAA, such right was not exercised timeously or at all. They just sat on their rights and the redemption sum was not even paid to MAA. The plaintiff's inaction and inertia are understandable. After all, they were not a property developer. They were a licensed moneylender. Clearly, they were only interested in getting back the principal sum and interest. As rightly submitted by the defendants, the plaintiff did not take steps to assert their interest over the land. We agree that the plaintiff did have a window of opportunity to settle the redemption sum that was payable to MAA. But they did not take any tangible steps in that direction. But the plaintiff maintained that they did have some discussion with officers from MAA, but those discussions did not meet the plaintiff's satisfaction.

**[305]** But there is absolutely no evidence that the plaintiff had at any time relinquished or waived their rights or interest as 'equitable chargee'. At all times, they had expected that they would receive their return of investment.

**[306]** On the other hand, D1 was a property developer. They wanted to develop the land and enjoy the development value potential from the land. It is not in dispute that the contractual documents between Sharma and D1 made explicit reference to the plaintiff's caveats. As such, anyone who was aware of these contractual documents, such as D2, would have known that the plaintiff is claiming certain rights over the land in the manner as stipulated in the SPBA.

**[307]** There is no doubt at all that the plaintiff knew that Sharma had done a deal with D1. The plaintiff was not shell-shocked that Sharma had done a deal with D1 to sell the land to the latter.

**[308]** In a sense, the plaintiff had acquiesced to the deal between Sharma and D1. They went along with the Sharma/D1 deal as they were led to believe and were therefore expecting to be paid their entitlement, ie the 'redemption sum'. The word 'redemption' is to be found in the several letters passing between the respective solicitors for Sharma, the plaintiff and D1. The word 'redemption' (in reference to the plaintiff) is also mentioned in D2's letter of offer dated 17 July 2012. Indeed, the letter of offer dated 17 July 2012 specifically and unequivocally states that the 'Term Financing' (TF-i) was 'To redeem from Malaysia Assurance Alliance Bhd, IB Capital Sdn Bhd (including the accrued interest) and to part finance the purchase of a piece of freehold vacant land at Kebun Bunga Pulau Pinang)'. However, the plaintiff's interest did not feature in D2's supplementary letter of offer dated 5 August 2013. D2 claimed that they have *no knowledge of the plaintiff's interest* in and over the land as stated in the plaintiff's caveats.

**[309]** Of course, one may ask, didn't D2 conduct a land search prior to issuing the letter of offer dated 17 July 2012? If they had done land search, they would have noticed that the plaintiff had entered the two caveats and was claiming an interest over the land. In our view, the fact that the letter of offer dated 17 July 2012 referred to payment of redemption sum to the plaintiff makes it plain, unarguable and inescapable that D2 was aware of the plaintiff's interest over the land and they knew that there was 'redemption sum' which was payable to the plaintiff. It is immaterial whether they knew of the plaintiff's interest via a land search or through any other route. In any event, DW2 did say that D2 was aware of the plaintiff's caveats. Hence, D2 had actual knowledge of the plaintiff's interest over the land.

**[310]** There was ample evidence that D1 (through their solicitors) and Sharma were actively in communication on the issue of the redemption sum payable to the plaintiff. In early 2008, D1's stance was that CIMB Bank Bhd (not CIMB Islamic Bank Bhd — D2) had approved a loan facility and that the loan would be used to pay the plaintiff's their redemption sum.

**[311]** To this end, D1 asked and were given the redemption statement as at various dates in the form/format which was acceptable to CIMB Bank Bhd. During this exchange, D1's solicitors intimated to the plaintiff that CIMB Bank Bhd would be entering a caveat. And they did exactly that. See: Private Caveat via Perserahan No 0799B2008003165 dated 6 March 2008. Thus, CIMB Bank Bhd would have known about the plaintiff's caveats and of the plaintiff's interest in and over the land. But CIMB Bank Bhd and D2 are separate entities. We do not think that we can or should impute CIMB Bank Bhd's knowledge to D2.

**[312]** In any case, on the evidence, it was quite clear that D2 had actual knowledge of the plaintiff's interest as an equitable chargee and this is to be gathered from D2's letter of offer dated 17 July 2012.

**[313]** Next, the plaintiff's caveats are mentioned in the Joint Venture agreement dated 14 March 2007 between Sharma and D1. Recital D thereof states, 'there are two existing private caveats registered over the development land by IB Capital Sdn Bhd (hereinafter referred to as 'the caveator') vide Pres Nos 10195/2006 and 17740/2006 (hereinafter referred to as 'the said private caveats')'. The plaintiff's caveats were also mentioned in cl 1.1 of the JVA. Further, cl 18.2(d) required Sharma to obtain a letter from the plaintiff to undertake not to register any further caveats over the development land.

**[314]** On 21 June 2007, the first defendant and Sharma entered into the 'Supplementary Terms to the JVA'. Paragraph 7 of the said supplementary terms to the JVA stated:

> Sharma shall take all relevant actions including commencing and defending any legal suit against/by any party, any legal suit and *foreclosure proceedings by MAA and/or IB Capital Sdn Bhd* until D1 can successfully obtain financing from a bank to, inter alia, refinance the land.

**[315]** The Schedule to the general facilities agreement dated 6 August 2013 between D1 and D2 referred to (a) sale and purchase agreement dated 6 August 2007; (b) agreement dated 30 January 2008; and (c) deed of settlement dated 30 January 2008. The agreement dated 30 January 2008 is of particular importance as it clearly and unmistakably referred to the plaintiff's caveats.

**[316]** On 4 April 2008, D1 through Messrs Ong & Manecksha's letter to Messrs Gunaseelan & Associates (Sharma's then solicitors) stated, inter alia, that when D1 first considered entering into the joint venture with Sharma, D1 'was concerned about IB Capital's caveats on the land', and that, 'In fact, our client clearly stated that they would not enter into the joint venture unless IB Capital's caveats were first withdrawn'.

**[317]** D1 and D2 took a common stand and said that the SPBA, the powers of attorney and the plaintiff's caveats do not create any interest over the land which is registrable under the National Land Code. According to the defendants, the plaintiff only has a claim in personam against Sharma rather than any right in rem over the land. But the question is — what did the evidence reveal?

**[318]** In this regard, having looked at all the contemporaneous documentary evidence, including the several letters alluded to in the earlier part of this judgment, the Specific Performance Order dated 19 September 2011 in Suit 240, the consent judgment dated 21 August 2008 in Suit 775, the letter of offer dated 17 July 2012, the Schedule to the general facility agreement dated 6 August 2013, the Annexure to the Charge registered on 5 September 2013, the evidence of PW1, PW2, DW2 and DW2 (per the witness statements and oral testimony), there is no doubt whatsoever that the plaintiff was treated or regarded as having a right to enter the plaintiff's caveats and a right to initiate foreclosure proceedings for the monies that were lent by the plaintiff to Sharma and were entitled to be paid the redemption sum accordingly.

**[319]** Thus, regardless of whether in law the SPBA, the Order dated 21 August 2008, the powers of attorney that were given by Sharma was capable of giving rise to an interest over the land, as a fact, D1 did treat the plaintiff as a chargee. Since the plaintiff did not have legal charge which was registered over the land, the plaintiff was therefore an equitable chargee (see: *Manilal v Mahadevan.)*

**[320]** It is interesting that item [14] of the Schedule to the general facility agreement dated 6 August 2013 which deals which conditions which must be fulfilled before disbursement of the facilities can be made, states at (8) that 'Other private caveats holders have been paid and removed prior to the disbursement of the TF-i(if any)'.

**[321]** We also noted that the letter of offer dated 17 July 2012 is specifically mentioned in items [16] and [17] of the Schedule to the general facility agreement dated 6 August 2013. The supplementary letter of offer is mentioned in item [17] but it is 'undated'.

**[322]** We find this all rather clumsy and sloppy. Perhaps it was a mistake or oversight by D2 or the solicitors who handled the loan documentation. We do not know. And it does not matter one way of the other. In fact, we should not get too caught up or distracted with the appearance of the letter of offer dated 17 July 2012 in the general facility agreement dated 6 August 2013 and once again in the Annexure to the Charge which was registered on 5 September 2013.

**[323]** As we have mentioned earlier, the real issue is whether D2 was aware of the plaintiff's interest over the land. Their pleaded case is that they knew nothing about the plaintiff's interest over the land.

**[324]** But to the contrary, we find that there was overwhelming evidence to demonstrate that D2 was aware about the plaintiff's interest or claim over the land, ie, the plaintiff's entitlement to be paid the redemption sum. DW2 candidly admitted that he knew that part of the loan proceeds were to be used to pay the redemption sum to the plaintiff so that the plaintiff's caveats may be removed. The letter of offer dated 17 July 2012 expressly stated that the 'purpose' of the Term Finance-I (TF-i) was to enable D1 to purchase the land and to pay the redemption sums to MAA and the plaintiff.

**[325]** The letter of offer dated 17 July 2012 was expressly mentioned in the general facility agreement dated 6 August 2013 and in the Annexure to the Charge which was registered on 5 September 2013.

**[326]** It was a condition in the Schedule to the general facility agreement dated 6 august 2013 that all caveat holders have been paid a defendant caveats removed before disbursement can be made. D1's agreement dated 30 August 2008 with Sharma, which expressly referred to the plaintiff's caveats, was mentioned in the Schedule to the general facility agreement dated 6 August 2013. The order for specific performance dated 19 September 2011 in Suit 240 was served on D2 and they would have been aware that under para (d), Sharma was to have procured the redemption statement from the plaintiff and handed it to D1. Whilst they may have been aware or informed that the plaintiff's caveats expired or lapsed on 17 July 2012 and 29 November 2012 respectively and that D1 had obtained an Order dated 22 January 2013 in OS 2016 which purports to cancel the plaintiff's caveats (albeit that they had already lapsed) and that the plaintiff was restrained from entering any fresh caveats over the land, D2 ought to have made the necessary enquiries to determine whether the redemption sum had in fact been paid to the plaintiff. The evidence suggests that D2 was not concerned or was oblivious as to whether the redemption sum had been paid to the plaintiff. They were quite content with the knowledge that the plaintiff's caveats had lapsed and that D1 had obtained an order restraining the plaintiff from entering any fresh caveats. This to our mind is suggestive of wilful blindness.

**[327]** Having regard to everything that the defendants knew about the plaintiff's interest, it becomes relevant to ask whether, as submitted by the plaintiff's counsel, the defendants were guilty of equitable fraud.

**[328]** It is of course important to remind ourselves that this is not a case where the plaintiff has alleged common law fraud.

**[329]** Hence, it is not necessary to show common law fraud to establish a constructive trust. It is sufficient if *equitable fraud is established*. In *Takako Sakao* the Federal Court discussed equitable fraud as follows:

> [23] The 'fraud' of which Lord Halsbury spoke in *Salomon v A Salomon & Co Ltd includes equitable fraud. In the recent Australian case of The Bell Group Ltd (In liquidation) v Westpac Banking Corporation (No 9)* [2008] WASC 239; 70 ACSR 1, Owen J discussed the distinction between equitable fraud and fraud at common law. His Honour said:
>
> > 4849 One of the leading Australian texts on equitable principles is R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th Ed, 2002). When I refer to this text from time to time in these reasons I will do so by the shortened phrase '*Meagher, Gummow and Lehane*'.
>
> At [12–050] the authors set out a non-exhaustive list of factual and legal situations that have traditionally been treated as species of equitable fraud. They include:
>
> (a) misrepresentation by persons under an obligation to exercise skill and discharge reliance and trust (for example in fiduciary relationships), and inducements to contract or otherwise for the representee to act to his detriment in reliance on the representation;
>
> (b) the use of power to procure a bargain or gift, resulting in disadvantage to the other party;
>
> (c) conflict of interest against a duty arising from a fiduciary relationship; and
>
> (d) agreements which are bona fide between the parties but in fraud of third persons.
>
> 4850 All of these categories can be seen, to varying degrees, in the claims brought by the plaintiffs in the equitable fraud causes of action. The last category is of particular interest because it encompasses the imposition and deceit species referred to as the Earl of Chesterfield fourth limb. I will come to that doctrine shortly.
>
> 22.2.1.2. Equitable fraud and common law fraud compared
>
> 4851 The term common law fraud is often used to describe the tort of deceit, or the making of fraudulent misrepresentations. The tort of deceit is said to encompass cases where the defendant knowingly or recklessly makes a false statement, with the intention that another will rely on it to his or her detriment.
>
> 4852 *Derry v Peek* [1889] UKHL 1; (1889) 14 App Cas 337 illustrates the principle that honesty is a duty of universal obligation, existing independently of contract or fiduciary obligations. In *Derry v Peek*, the House of Lords rejected the argument that a claim of negligence would support an action for fraudulent misrepresentation. In so doing, Their Lordships set the standard for common law fraud. Lord Herschell said, at p 374, that to succeed, a plaintiff must prove 'that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly, careless whether it be true or false'.
>
> In other words, there must be a lack of an honest belief in the truth of the representation. In *Armitage v Nurse* [1997] EWCA Civ 1279; [1998] Ch 241; [1997] 3 WLR 1046, Millett LJ discussed the meaning of 'actual fraud' in the

context of an exemption clause. At p 1053, His Lordship described actual fraud as connoting, at least, 'an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not'.

This, then, marks out a significant difference between common law fraud and equitable fraud. The latter does not require proof of an actual intention to deceive.

To summarise, a plea of fraud at common law will not succeed absent proof of an intention to deceive. Such an intention is not an ingredient of equitable fraud which is, essentially speaking, unconscionable conduct in circumstances where there exists or is implied or imposed a relationship of trust or confidence.

**[330]** In our view, there was equitable fraud because the defendants entered into banking facility agreements, which are bona fide in themselves, but they are in fraud of the plaintiff. On the issue of pleading of equitable fraud, counsel for D2 complained that particulars that show equitable fraud were not pleaded in the amended statement of claim.

**[331]** In response, counsel for the plaintiff said that the words equitable fraud need not be pleaded so long as all the relevant and necessary material facts to support such a plea are pleaded. He said (correctly in our view) that the plaintiff only needs to plead facts and not legal consequences.

**[332]** In *In re Vandervell's Trusts (No 2) White and others v Vandervell Trustees Ltd* [1974] Ch 269, Lord Denning LJ (pp 321–322) said:

It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit. The pleadings in this case contained all the material facts. It does appear that Mr. Mills put the case before us differently from the way in which it was put before the judge: but this did not entail any difference in the facts, only a difference in stating the legal consequences. So it was quite open to him.

**[333]** And as for the plea of fraud, we may refer to the Federal Court's decision in *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799; [2014] 1 AMR 418; [2014] 2 CLJ 445, where the Federal Court said:

[34] ... The particular kind of fraud (actual or constructive) was not classified by the respondents. But there was no requirement for that to be classified. There was also no requirement that the means by which the respondents were kept from knowledge of their right to institute action be classified as actual or constructive.

'Conclusions of law, or of mixed law and fact, are no longer to be pleaded. It is for the court to declare the law arising from the facts proved before it' (*Odgers on Civil Court Actions* (24th Ed) at p 151). What was required of the pleadings was that the

appellants had adequate notice of the case to meet.

The pleading of fraud with particulars was enough for the appellants to know what to answer. With those particulars, there was notice of the kind of fraud alleged. It is not the label to it, but the pleaded facts that determine the ultimate classification of the kind of fraud. Whether it is actual, constructive or equitable fraud is not for the pleader but for the trier to find. So in *Nocton v Ashburton* [1914] AC 932, 'the House of Lords held that the statement of claim supported a cause of action for equitable fraud involving a breach of fiduciary duty which entitled the plaintiff to relief, although a charge of common law fraud failed at the trial, and the charge of equitable fraud did not emerge until the case reached the House of Lords' (*Spenser Bower, Turner and Handley, Actionable Misrepresentation*, supra (4th Ed) at p 386).

[67] ...

Question 6 — (Where) a plaintiff relies on the type of fraud called equitable or constructive fraud, whether it is incumbent on him to plead the particulars of this class of fraud as would be incumbent on him if he were to plead fraudulent misrepresentation or common law fraud?

Answer — *When a plaintiff relies on the type of fraud called equitable or constructive fraud, it is incumbent on him to plead facts to support the class of fraud. We must add that 'The most important issue concerning the sufficiency of pleadings remains whether the defendant is informed of the case to be met and is not unfairly taken by surprise'* (*Oliver v Decorby* 2005 SKQB 279; (2005) 267 Sask R 147 (Q.B.) per Ball J), and 'The general rule that fraud must be specifically pleaded would not... apply when the party aggrieved raised no objections and fights out the case as though the pleadings were in proper form (*Beni Madho v Basanto Kunbi* 35 IC 252 All)' (Mogha's *Law of Pleadings in India* (16th Ed) at p 66).

**[334]** To round off on the pleadings point, we are satisfied that there was ample material in the amended statement of claim to put the defendants on notice that they had to meet a case of equitable fraud and constructive trust (the latter of which was expressly stated). In the result, it is quite clear from the evidence that the defendants in the appeal before us knew exactly the case that they had to meet. We have no hesitation in rejecting the objection that was raised by D2 that equitable fraud was not pleaded.

**[335]** It is clear that the defendants had not acted bona fide in this matter. Indeed, it is apt to say that the defendants did not act honestly and this destroys their plea of being bona fide purchasers. The fact that D1 had paid the purchase price or that D2 had financed the purchase of the land only means that they had expended monies from their own pockets. But that of itself does not equate to conduct which is bona fide.

**[336]** In light of the case that was presented at the trial, it was wholly incumbent upon the High Court to have carefully examined the conduct of the parties. Here the judge paid close attention to the plaintiff's conduct but ignored the conduct of the defendants and erroneously regarded the

defendants as bona fide purchasers. The judge regarded the payment of the full purchase price and timeliness of action as the touchstone of bona fide conduct.

**[337]** No doubt these are important considerations. But ultimately the judge ought to have asked herself whether the defendants acted honestly in regard to the plaintiff's interest over the land. There are so many questions that called out for answers which in the end, were not answered by the defendants.

**[338]** Clearly, Dato' Low would have had to answer many of the questions that surfaced during the trial. The bank officer, Veera should have been called to explain the issue in relation to the letter of offer dated 17 July 2012 as compared to the supplementary letter of offer dated 5 August 2013 and why the Annexure to the Charge referred to the earlier letter of offer. The question that Dato' Low (if he had bothered to testify) would have had to answer was — what happened to the plaintiff's interest over the land? Was Dato' Low satisfied that the redemption sum (with reference to the matters stated in the plaintiff's caveats) had been paid to the plaintiff?

**[339]** Another question is — why were the cause papers for OS 2016 served on an address when D1's solicitors were aware that the plaintiff was no longer at that address? If as DW1 conceded, D1 or rather their solicitors would have been keeping track of Suit 775, why didn't D1 take steps to intervene in that matter or why didn't D1 communicate with the plaintiff to resolve the issue of payment of the redemption sum which was payable to the plaintiff?

**[340]** Particularly, after obtaining the order dated 19 September 2011 in Suit 240, why didn't D1 deal with the plaintiff and obtain the redemption sum as well as the plaintiff's consent for the cancellation of the caveats? As for D2, the question is not very different and they too ought to have asked whether the redemption sum had been paid to the plaintiff and what had happened to the plaintiff's interest in and over the land?

**[341]** Hence, the issue of 'honesty' or the lack of it, was all too obvious. In this regard, we find it necessary to refer to the judgment of Edgar Joseph Jr in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1998] 1 AMR 16; [1998] 1 CLJ 793 (FC) where he discussed the common law definition of who is bona fide purchaser.

**[342]** At pp 530–531 (MLJ) Justice Edgar Joseph Jr referred to the judgment of Byrne J in *Hunt v Fripp* [1898] 1 Ch 675 (at p 682):

> I do not, therefore, except so far as it affects the conduct of the plaintiffs, propose to consider whether Emery was dealing fairly or otherwise, or whether he left undone what he ought to have done. It has been put to me, and I think not unfairly, that saying 'dealing bona fide' is equivalent to saying 'dealing honestly', and that what I

really have to consider is, *were the plaintiffs behaving honestly* when they took the assignment in question from Emery? A

**[343]** At p 531 Edgar Joseph Jr summed up and said:

> In our view, therefore, as here, there is a dispute between the immediate parties to a sale and purchase transaction, *a bona fide purchaser is not necessarily one who has paid the full purchase price. Much will depend upon the particular circumstances of each case.* B

**[344]** In the result, for the reasons as discussed in the preceding paragraphs of this judgment, we do not think that the defendants had acted honestly. They were not bona fide purchasers. C

**[345]** At this juncture, it would be convenient to quote the case of *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169; [1975] 1 LNS 187 where Suffian LP referred to the decision of the Privy Council in *Abigail v Lapin* [1934] AC 491 at p 501 on the question of priority of interests. The relevant passage from *Abigail v Lapin* which is germane to the issues in this case reads as: D

> ... *In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice* ... E

**[346]** In our view, the interests of the defendants were subordinated to that of the plaintiff who had a prior interest which equity will protect and preserve. But, the plaintiff did themselves no favours by being lethargic and showing inertia between 29 November 2012 and 5 September 2013. The plaintiff must pay a price for their inaction or rather for their failure to mitigate. But ultimately, we do not agree that the plaintiff's prior interest was lost because of their inaction after 29 November 2012. F G

**[347]** Indeed, given everything that the defendants were fully apprised of, it did not lie in their mouth to assert they were induced into acting to their prejudice. It is obvious enough that the defendants knew, or ought to have known, or at any rate, failed to act reasonably and make an enquiry from the plaintiff as to whether the redemption sum had been paid. The defendants acted quite inequitably. Their conduct was nothing less than an unmitigated manifestation of equitable fraud. On this issue we are satisfied that the plaintiff had pleaded all the requisite ingredients and material facts to sustain a plea of equitable fraud. H I

**[348]** As stated in *Takako Sakao* the intention to deceive is not an ingredient of equitable fraud. But equitable fraud encompasses agreements which are valid

in themselves but which are in fraud of third parties. Essentially, equitable fraud occurs where there is unconscionable conduct in circumstances where there exists or is implied or imposed, a relationship of trust or confidence. Indeed, all the necessary facts giving rise to the claim based on a constructive trust have been stated in paras 10–13 of the amended statement of claim. It is implicit that the plea of equitable fraud is necessarily encompassed within the parameters of the plaintiff's pleaded case on constructive trust.

**[349]** The facts of the present case are such that it is just and appropriate to impose a constructive trust in the remedial sense because of the unconscionable behaviour of the defendants as the owner of the legal title in asserting their own beneficial interest (*qua* registered owner/registered chargee respectively) and in denying the beneficial interest of the plaintiff.

**[350]** In *Ong Chat Pang* the Federal Court relied on Lord Thankerton's judgment in *Bhup Narain Singh v Goku Chand Mahton* (1933) LR 61 Ind App 115 which is authority for the proposition that the burden of proving that one is a bona fide purchaser for value lies upon him who so asserts.

**[351]** On the facts in that case, the third and fourth defendants had failed to do so. As such, judgment had rightly been given against them in favour of the plaintiff. In the present case, the corpus of evidence points irresistibly to the conclusion that the defendants were aware of the plaintiff's interest over the land and realising that the plaintiff's caveats had lapsed, they were quite prepared to ride roughshod over the plaintiff's rights/interest.

**[352]** The defendants were not at all concerned whether the redemption sum had been paid to the plaintiff. Plainly, the evidence *did not* demonstrate that the defendants were acting bona fide.

**[353]** We therefore agree that any reasonable tribunal armed with the facts as alluded to above, which we have analysed, would have concluded that the plaintiff had invested money in the land and the defendants had actual knowledge of the same and based on the principle in *Yeong Ah Chee*'s case, the beneficial interest in the land vested in the plaintiff upon the execution of the SPBA. Thus, a reasonable tribunal would have opined that the defendants' conscience was bound and it was appropriate to impose or fasten a remedial constructive trust of the plaintiff's interest

**[354]** To summarise, it is our finding that:

(a) upon the execution of the SPBA and payment of the loan sum (which then morphed into an investment sum) of RM8.8m to Sharma, the plaintiff became the beneficial owner of the land under a constructive

trust. The plaintiff's interest was that of equitable chargee. Initially, Sharma was the constructive trustee for the plaintiff's interest;

(b) the plaintiff's interest in and over the land was as stated in the grounds in support of the plaintiff's caveats;

(c) the defendants had actual knowledge of the plaintiff's interest over the land;

(d) the defendants are remedial constructive trustees of the land, whose beneficial owner was the plaintiff;

(e) the defendants behaved inequitably and displayed wilful disregard of the plaintiff's interest as equitable chargee, and were guilty of unconscionable conduct and therefore, equitable fraud;

(f) the defendants are not bona fide purchasers without notice of the plaintiff's prior interest; and

(g) the plaintiff did not lose their priority or entitlement to an equitable remedy due to their inaction and delay;

REMEDIES

**[355]** We turn now to the topic of remedies. It is important to identify the starting point in the grant of any remedy. It is this — the equitable claimant is prima facie, entitled to specific restitution of the trust property. If that is not possible, then equitable compensation is payable.

**[356]** In *Target Holdings Ltd v Redferns (a firm) and another* [1995] 3 All ER 785; [1996] AC 421; [1995] UKHL 10, Lord Browne-Wilkinson, opined that 'if specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed'.

**[357]** It need hardly be said that the court has a wide discretion in the matter of remedies. In this regard, it is appropriate to refer to the decision of the Court of Appeal in *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42; [2004] 5 AMR 648; [2004] 3 CLJ 679 (CA) where it was stated that the court in exercising its equitable jurisdiction can mould the appropriate relief as suits the circumstances of the case. This is what the Court of Appeal said [31]:

> [31] We now address the fourth point. Mr Tan's argument that the learned judge gave the plaintiff something he had not asked for overlooks two fundamental principles. *A court of equity exercises its jurisdiction not in a straight jacketed or inflexible fashion. The whole approach of equity to problems coming within its parameters is one of flexibility based on broad and general doctrines rather than strict and unyielding rules. This is the hallmark of equity and it is in this fundamental respect that equity differs and diverges from common law. Equitable remedies and doctrines are*

A *therefore flexible and adaptable to particular circumstances. The court of equity may therefore mould the relief that is to be granted on particular facts.*

So, for example if rescission appears to be the inevitable or indeed the only remedy in a given case, a court of equity may decline to order rescission and instead may order equitable compensation by way of adjustment. The cases of *Gluckstein v*
B *Barnes* [1900] AC 240 and *Dusik v Newton* [1985] 62 BCLR 1 amply illustrate *the malleability of equitable remedies to fit particular circumstances*. We therefore find no merit in Mr Tan's argument. (Emphasis added.)

C **[358]** Essentially, the primary remedy is restitution or if that is not possible, then equitable compensation. The primary remedy is for restitution of the land. But that is too problematic since D1 had paid RM6.5m to MAA and D2 paid RM40m to MAA. D1 is servicing the loan that was taken from D2. In any case, since we are of the view that the plaintiff succeeded as an equitable chargee and a beneficiary under a constructive trust, the question of restitution of the
D land does not arise. It is only a matter of equitable compensation. Indeed, following the Canadian case of *Atlas Cabinets*, under the remedial constructive trust, it is permissible to award monetary compensation where restitution is not possible or where a restitutionary remedy would be unjust or unfair in all the circumstances.

E

**[359]** Thus, the starting point is to ask what was the amount which was due and payable by Sharma to the plaintiff. The appropriate nomenclature to describe the amount which was due and payable is 'the redemption sum'.

F

**[360]** After all, that is how D1/D2 had described the amount that was payable to the plaintiff for the purposes of cancelling the plaintiff's caveats. From the evidence, the amount payable was RM5m as at 9 May 2006.

G **[361]** Thereafter, as per the SPBA, the amount was RM8.8m. By letters dated 29 January 2008 and 31 January 2008 D1 had proposed to pay RM9m as the redemption sum. By 4 February 2008, the plaintiff was prepared to accept RM9m if payment was made by 6 February 2008 (see: Messrs Sandosh Anandan's letter dated 4 February 2008).

H

**[362]** It should also be mentioned that D1 was prepared to pay 'interest' of RM135,000 on top of RM9m if the plaintiff would give D1 extension of time until 6 March 2008 to make the payment (see: Messrs Ong & Maneksha's letter dated 15 February 2008). As it turned out, D1 did not make the payment
I within any of the original or extend time periods that were discussed and agreed upon.

**[363]** D1 nevertheless kept asking for the redemption statement from the plaintiff. In the plaintiff's letter of undertaking dated 14 March 2008

(addressed to CIMB Bank Bhd), the redemption sums payable on or before 30 April 2008 (including interest of RM369,600) was RM9,369,600. In a letter dated 10 March 2008 from the plaintiff to Sharma, it was stated that the amount outstanding as at 6 February 2008 was RM10,453,074.39. But the plaintiff was prepared to accept RM9,264,000 if payment was made by 6 April 2008. In the consent judgment dated 21 August 2008 (Suit 775), Sharma agreed that the amount payable was RM10,256,098 as at 31 August 2008. There is no easy answer to the question of equitable compensation.

**[364]** However, in our view, the proper approach to the question would be to ask, all things being equal, and if all impediments had been resolved by Sharma, what would D1 have paid either by themselves, or from the banking facility, to pay the plaintiff (ie the redemption sum) so as to cancel the plaintiff's caveats? As can be seen, it could be any one of the amounts. But in our view, the amount that should be used to calculate the amount of equitable compensation is the amount per the redemption amount that D1 had agreed to in January 2008, ie *RM9m*.

**[365]** At the very least, RM9m is the amount which the plaintiff had been deprived off. Clearly if Sharma had done his part and attended to the removal of the three private caveats by TAF Holdings Sdn Bhd, Kam Chee Hong, and Lim Soo Kiang, D1 would in all likelihood, have paid the redemption sum to the plaintiff.

**[366]** Next, we move on to consider a key point that was conceded by plaintiff's counsel (during the trial) as the 'weakest point' of his case — whether there is anything in the plaintiff's conduct which warranted the application of a duty to mitigate and consequently to reduce any award of equitable compensation by reason of any failure in that regard.

**[367]** One may ask — whether the issue even arises for consideration? Or did the plaintiff's failure to mitigate extinguish the claim in equity? On the issue of mitigation, it is in our view relevant to start the discussion by referring to a paper that was presented by Robert Ribeiro Permanent Judge in the Hong Kong Court of Final Appeal titled, 'Equitable Compensation for Breach of Fiduciary Duty' which was delivered at the Asia-Pacific Judicial Colloquium, Singapore May 2019 (see [71]–[89]).

**[368]** Of particular relevance to the discussion at hand is the observation in [73] on whether there is a duty on the part of the beneficiary to 'mitigate' damages. In [73] Justice Ribeiro referred to the minority judgment of McLachlin J in the Canadian case of *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 at p 554 which was endorsed in *Libertarian Investments*

*Ltd v Thomas Alexej Hall* [2014] 1 HKC 368; [2013] HKCFA 93; (2013) 16 HKCFAR 681 (6 November 2013).

**[369]** Thus, the gist of McLachlin J's opinion is that a failure by the beneficiary (under a trust) to act is only material where the omission is so unreasonable and 'egregious' that it is regarded as severing the causal connection between the breach and the plaintiff's loss. The relevant part of [73] reads as:

> [73] ... *A failure by the plaintiff to act is only material where the omission is so unreasonable and 'egregious' that it is regarded as severing the causal connection between the breach and the plaintiff's loss*. McLachlin J expressed this as follows:
>
> > In negligence and contract the law limits the actions of the parties who are expected to pursue their own best interest. Each is expected to continue to look after their own interests after a breach or tort, and so a duty of mitigation is imposed. In contrast, the hallmark of fiduciary relationship is that the fiduciary, at least within a certain scope, is expected to pursue the best interest of the client. It may not be fair to allow the fiduciary to complain when the client fails forthwith to shoulder the fiduciary's burden.
> >
> > This approach to mitigation accords with the basic rule of equitable compensation that the injured party will be reimbursed for all losses flowing directly from the breach.
> >
> > *When the plaintiff, after due notice and opportunity, fails to take the most obvious steps to alleviate his or her losses, then we may rightly say that the plaintiff has been 'the author of his own misfortune'.*
> >
> > At this point *the plaintiff's failure to mitigate may become so egregious that it is no longer sensible to say that the losses which followed were caused by the fiduciary's breach. But until that point mitigation will not be required.*

**[370]** We have not overlooked the fact that the plaintiff here was indolent and lethargic towards the later part of the period of gestation of the several events that we had copiously alluded to. We were very much alive and conscious to the fact that the plaintiff did not act diligently. They attempted to proffer some excuses for not taking steps or action to protect their interest. They appeared to suggest that they had a problem with their previous solicitors.

**[371]** Our response is — so what? If there was a problem with the existing solicitor then they, as parties who are engaged in commercial and business activities ought to have been aware that they were under a duty to do whatever is necessary to protect their interest within the permissible parameters of the law. Before us, it was argued on behalf of the plaintiff that there was no delay because as soon as they found out about the status of the land, the plaintiff instructed their solicitors and Suit 20 was promptly filed on 29 January 2014.

**[372]** But that argument is rather too convenient and plainly ignores the fact that the plaintiff did not take any overt steps to protect their interests since the caveat expired on 29 November 2012. To be clear, we have no issue with the plaintiff's conduct until 29 November 2012 because there was nothing that anyone could do in terms of dealing with the land as the plaintiff's caveat was a stumbling block. However, the plaintiff was not 'protected' after 29 November 2012. They were at risk after that date. It is of course questionable whether they would have been able to lodge another caveat on the same grounds (see: s 329(2) of the National Land Code ). However, there are other steps that could have been taken to protect their interest. Hence, for example — why didn't the plaintiff apply for a protective injunction order to restrain Sharma and which, inter alia, could have indirectly stymied the dealings of other parties such as the defendants.

**[373]** The injunction order could well have been applied for in Suit 775 or perhaps in a fresh action. Such an injunction could have been served on the Pejabat Pendaftar Hakmilik Tanah Pulau Pinang so that the order is endorsed on the title. The fact that there was already a caveat in place was no impediment to an injunction being issued.

**[374]** The legal position is that an injunction and a caveat can co-exist harmoniously. In this regard it is relevant to quote Justice Lee Hun Hoe CJ (Borneo) in *Manilal & Sons (M) Sdn Bhd v M Majumder* [1988] 2 MLJ 305; [1988] 1 LNS 16 SC where he said p 308:

> It is not uncommon for caveat and injunction to exist side by side. Together, they give a complete safeguard. In *Walsh v Alexander* (1913) 16 CLR 293 where the defendant agreed to sell the plaintiff a certain home-stead selection but subsequently repudiated the agreement, an order for specific performance was made and an injunction in terms was also granted. On appeal Barton ACJ said at p 303:
>
> > It is urged that the respondent's caveat sufficiently protects him, and therefore he cannot have an injunction. I do not agree. The caveat does not give the purchaser relief as comprehensive or as direct as he gains by the jurisdiction *in personam*, and therefore it cannot be held to be the exclusive remedy ...

**[375]** The question is whether in light of the matters alluded to earlier concerning the plaintiff's inaction, the claim should be dismissed altogether, or whether the court should take such conduct into account and have due regard to the entire factual matrix and circumstances attendant upon this case, including but not limited to the fact that D1 has gained a benefit in that they have gained a massive benefit in not having to pay the redemption sum to the plaintiff, and that D2 had at the very least acquiesced to or was in *pari delicto* with D1's unconscionable conduct.

**[376]** Now, although we are convinced that the plaintiff succeeds in the action, we are of the view that there was a failure on their part to mitigate. We should add that there is no evidence that the plaintiff knew what went on after the plaintiff's caveats lapsed. But nevertheless, they are guilty of inaction and failure to protect their interest.

**[377]** As such, the plaintiff will have to pay a price for their inaction. In our view, we think that a *20% deduction* from the award of the equitable compensation that is to be granted by this court, would be fair and equitable. As for the defendants, clearly D1 was the more culpable as compared to D2. D1 was not an innocent or naïve transacting party who came along to purchase the land from Sharma. They were 'deep in the trenches' from around 2006. In our view, it is fair, reasonable and equitable to apportion *liability at 70% against D1*. That leaves D2. In our view, *D2 should be liable to pay 10%* of the compensation for their role in this commercial quagmire.

**[378]** As we said earlier, although various amounts were stated in the several redemption statements in 2008, we were not convinced that the plaintiff should be awarded equitable compensation on the basis of those figures. In our view, equitable compensation should be calculated on the basis of the base sum of *RM9m*. And the amounts ordered herein shall carry interest at 5%pa from the date of the judgment in the High Court ie 19 April 2019. We did not think that in the circumstances, the plaintiff should be compensated with interest with reference to any earlier date. This is because of the plaintiff's delay and inaction.

THE OUTCOME

**[379]** For the reasons as stated above, we are of the view that there was a demonstrable misunderstanding of relevant evidence and a demonstrable failure to consider relevant evidence. There was a 'lack of judicial appreciation of evidence' which rendered the decision of the judge as plainly wrong. As such, appellate intervention is warranted in the circumstances.

**[380]** In reaching our conclusion, we were mindful of the fact that the judge had the audio/visual advantage which this court was deprived of. Further, we are also acutely aware that the 'plainly wrong' test is not intended to be used by an appellate court to substitute its own decision for that of the trial court on the facts. (see paras 54, 72, 74 and 76 *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors*.

**[381]** However, having regard to all the issues that were discussed in the preceding paragraphs we are of the view that the judge's decision cannot be reasonably explained or justified and was one which no reasonable judge could

have reached. The appeal is therefore allowed. The decision/order of the High Court dated 19 April 2019 is hereby set aside.

**[382]** The first respondent (D1) is ordered to pay equitable compensation in the sum of *RM6.3m* (being 70% of the sum of RM9m) with interest thereon at the rate of 5%pa on the said sum with effect from 19 April 2019 until the date of full payment or realization. The second respondent (D2) is ordered to pay equitable compensation in the sum of *RM900,000* (being 10 % of the sum of RM9,000,000) with interest thereon at the rate of 5%pa on the said sum with effect from 19 April 2019 until the date of full payment or realization.

**[383]** The first respondent (D1) shall pay costs of *RM100,000* (as costs here and below) (subject to allocator). The second respondent (D2) shall pay costs of *RM100,000* (as costs here and below) (subject to allocator).

**[384]** My learned brothers Justice Datuk Yaacob bin Hj Md Sam and Justice Dato' Che Mohd Ruzima bin Ghazali, have read the final draft of this judgment. They agree with the decision and the grounds in support of the decision. As such, this is the unanimous decision of the court.

*Appeal allowed; decision of High Court set aside.*

Reported by Dzulqarnain Ab Fatar